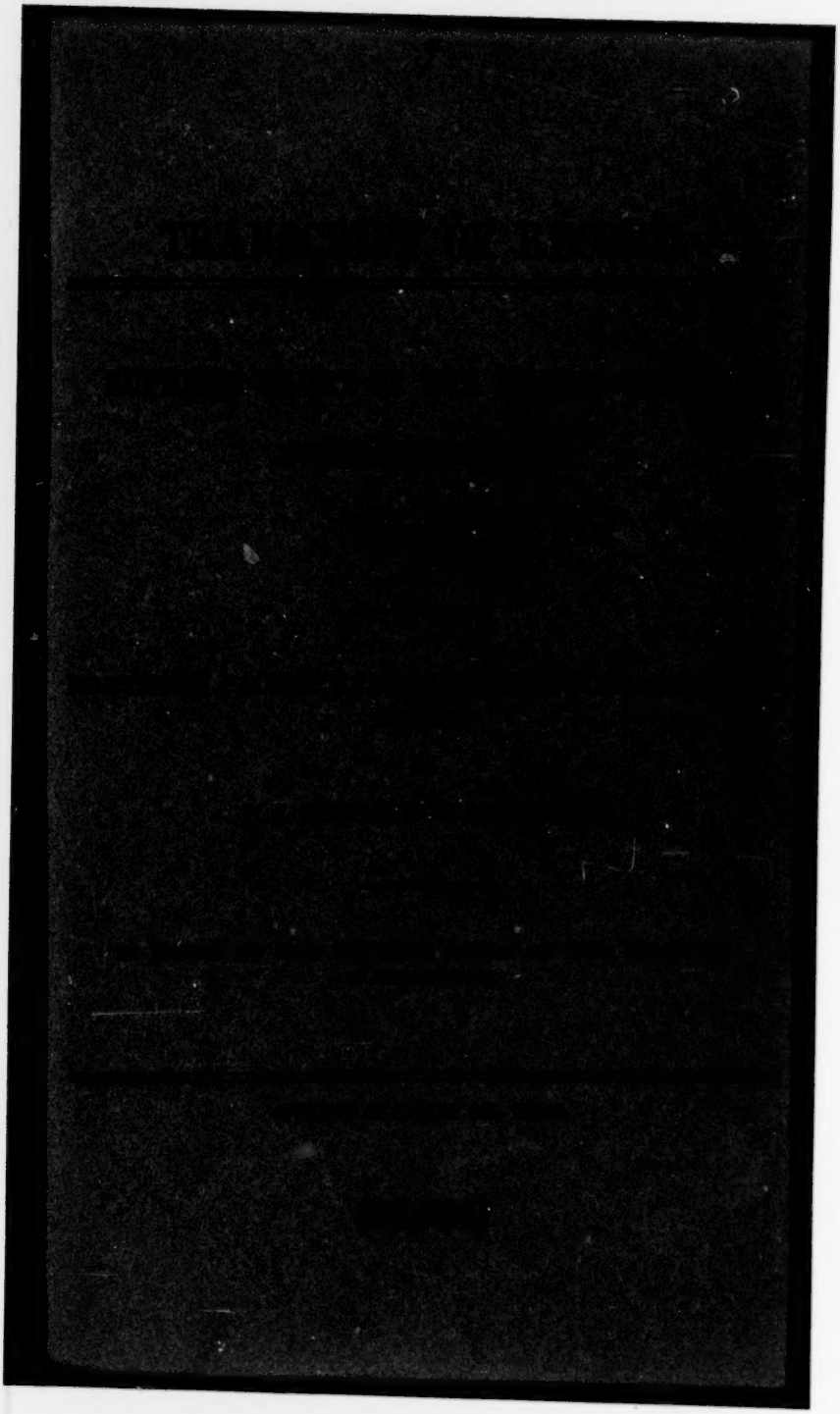

(24,094)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 389.

NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

P. J. CONCANNON AND WIFE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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1 In the Superior Court of the State of Washington in and for the County of Pierce.

No. 28618.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

P. J. CONCANNON and JANE DOE CONCANNON, His Wife, Whose True Name is Unknown to This Plaintiff, Defendants.

Amended Complaint.

The plaintiff complains of the defendants and for a cause of action alleges:

I.

That the defendants P. J. Concannon and Jane Doe Concannon are husband and wife, and that the true christian name of the defendant Jane Doe Concannon, is to this plaintiff unknown.

II.

That the plaintiff is, and for more than twelve years last past has been a corporation, organized and existing under and by virtue of the laws of the state of Wisconsin, and duly authorized to do business in the State of Washington, by reason of having complied with the laws of said state in relation to foreign corporations, and is now engaged in the business of operating a railroad in said state of Washington and elsewhere, and has paid its annual license fee last due.

III.

That the Northern Pacific Railroad Company was incorporated by an Act of Congress of the United States approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast by the northern route," and the organization and existence of said Northern Pacific Railroad Company, under and
2 by virtue of said Act of Congress continued and existed until after the conveyance, by it, to the plaintiff hereinafter mentioned.

IV.

That in and by said Act of Congress and the resolutions amendatory thereof and supplementary thereto, passed by the Congress of the United States under date of April 10, 1869, and May 31, 1870, there was granted to the said Northern Pacific Railroad Company a right of way through the public lands of the United States, to the extent of two hundred feet in width on each side of its railroad where it should pass through the public domain, together with necessary grounds for stations, side tracks, etc., and that the premises hereinafter described were at the time of the passage of said act public lands and a part of the public domain of the United States; and said Northern Pacific Railroad Company, in pursuance of the conditions of said Act, and in compliance therewith, and with the terms thereof,

constructed a line of railway as therein provided, and acquired title and possession of the premises hereinafter described, as a part of its right of way, said premises all being two hundred feet of the center line of said railroad, as constructed and now maintained and operated by this plaintiff.

V.

That heretofore, and in the year, 1896, the plaintiff, said Northern Pacific Railway Company, for a valuable consideration, purchased and by summary deeds of conveyance duly executed and acknowledged by and on behalf and for the use and benefit of said Northern Pacific Railroad Company, acquired from said Northern Pacific Railroad Company the title to all and singular, its property franchises, and estate, real, personal and mixed, including the premises hereinafter described, and then and there became entitled to the possession of said premises, which are particularly described as follows, to-wit:

Description of land occupied by P. J. Concannon, on
3 Northern Pacific right of way.

Situated in northeast quarter of southeast quarter, section eight (8) township twenty (20) north, range three (3) east W. M., City of Tacoma, Pierce County, Washington, and more particularly described as follows:

Commencing at a point which is south no degrees thirty seven minutes east (S. 0* 37′ E.) along east line of block nine (9) Van Duzen's Addition, four hundred twenty five (425) feet from northeast corner block nine (9) Van Duzen's Addition to New Tacoma, W. T., according to the plat thereof filed for record in office of county auditor of Pierce county, W. T., on 18th day of September, 1883, and now of record in volume 1 of Plats, at Page 64 of Records in office of county Auditor, Pierce county, Washington, being place beginning. Said point being south no degrees thirty-seven minutes east (S. 0* 37′ E.) a distance twenty four and ninety two hundredths (24.92) feet along east line block nine (9) Van Duzen's Addition, from intersection of Northern Pacific right of way with east line of said block nine (9); thence south eighty nine degrees twenty three minutes west (89* 23′ W.) seventy six and forty-nine hundredths (76.49) feet, along south line block nine (9) Van Duzen's Addition to intersection with Northern Pacific right of way; thence south seventy-eight degrees one minute west (S. 78* 1′ W.,) thirty one and twenty six hundredths (31.26) feet; thence south seventy-nine degrees forty-five minutes west (S. 79* 45′ W.) one hundred twenty eight and thirty two hundredths (128.32) feet; thence south no degrees fifteen minutes west (S.)* 15′ W.) fifty two and five tenths (52.5) feet, to edge of bluff, thence north eighty-six degrees fifty four minutes east (N. 86* 54′ E.) along edge of bluff, one hundred fifteen and one tenth (115.1) feet; thence north seventy four degrees fifty four minutes east (N. 74* 54′ E.) one hundred twenty three and one tenth (123.1) feet; thence north no degrees
4 thirty seven minutes west (0* 37′ W.) forty four and one tenth (44.1) feet, to place of beginning.

Said land occupied by P. J. Concannon, containing — acres, more or less.

VI.

That the defendants, without right of authority so to do, wrongfully and unlawfully entered into possession of and disposse-d plaintiff of said premises and wrongfully and unlawfully withhold possession thereof from the plaintiff, and refuse to surrender to the plaintiff possession of the whole or any part of said premises, and now make some claim of right thereto.

VII.

That the value of the use and occupancy of said premises during the time they have been so wrongfully and unlawfully withheld from the plaintiff, is the sum of five hundred dollars ($500.00).

Wherefore, plaintiff prays judgment for the possession of said premises and that its title thereto be quieted and to remove any cloud from its title that may appear from any color of title that may be claimed by the defendants, and for the sum of Five Hundred dollars ($500.00) for the use and occupancy of said premises, and that it recover its costs and disbursements in this action.

GEO. T. REID,
J. W. QUICK,
L. B. DA PONTE,
Attorneys for Plaintiff.

STATE OF WASHINGTON,
County of Pierce, ss:

L. B. da Ponte, being first duly sworn, on oath deposes and says; that he is one of the attorneys for the plaintiff in the above entitled action; that the same is a foreign corporation, and that he makes this verification for and in its behalf, being authorized so to do; that he has read the foregoing complaint, knows the con-
4½ tents thereof and believes the same to be true.

L. B. DA PONTE.

Subscribed and sworn to before me this 9th day of January, 1911.

F. M. HARSHBERGER,
Notary Public in and for the State of Washington, Residing at Tacoma, in said County.

Received a copy of the foregoing amended complaint this 9th day of January, 1911. HUFFER, HAYDEN & HAMILTON,
Attorneys for Defendants.

Filed in Superior Court Jan. 10, 1911.
E. F. McKENZIE, *Clerk.*

5 In the Superior Court of the State of Washington in and for the County of Pierce.

No. 28618.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
P. J. CONCANNON and JANE DOE CONCANNON, His Wife, Whose True Christian Name is to This Plaintiff Unknown, Defendants.

Answer to Amended Complaint.

Now comes the defendants above named and for answer to amended complaint of plaintiff say:

I.

In answer to paragraph IV of said amended complaint, defendands deny that the premises described in said amended complaint, or any part of them were, at the time of the passage of the act therein referred to, public lands or a part of the public domain of the United States, and deny that the Northern Pacific Railway Company, in pursuance of the conditions of said act, or in compliance therewith or otherwise, acquired the title or possession of the premises therein referred to or any part thereof as a part of its right-of-way or otherwise or at all; and defendants deny any knowledge or information sufficient to form a belief as to the truth of each and all of the other allegations contained in said paragraph IV and therefore deny the same and each of them.

II.

In answer to paragraph V of said amended complaint, defendants deny each and every allegation therein contained.

III.

Defendants deny each and every allegation contained in paragraph VI of said amended complaint, except that they refuse to surrender to plaintiff the possession of the premises therein mentioned and that they now make some claim of right thereto.

IV.

Defendant- deny each and every allegation contained in paragraph VII of said amended complaint and especially deny that the value of the use and occupancy of the premises therein referred to is of the sum of five hundred dollars ($500.00) or any other sum or amount.

First Affirmative Defense.

Further answering said amended complaint and as and for a first affirmative defense thereto, defendants allege that neither the plaintiff nor any of its predecessors or grantors was seized or possessed of the premises described in plaintiff's amended complaint or any part thereof within ten years before the commencement of this suit, or within ten years prior to April 28th, 1904.

Second Affirmative Defense.

Further answering said amended complaint and for a second affirmative defense thereto, defendants allege that they and their predecessors in interest have and had for more than ten years prior to the commencement of this suit, and more than ten years prior to April 28th, 1904, been in the actual, open, notorious, continuous and hostile possession of the said land and the whole thereof under a claim of right thereto and of ownership thereof and are now and they were at the time of the commencement of this action, the owners in fee simple of said property and the whole thereof, in the possession and entitled to the possession of the same and plaintiff has no right, title or interest in or to the same or any part thereof.

Third Affirmative Defense.

Further answering said amended complaint and for a third affirmative defense, thereto, defendants allege that they and their predecessors in interest have, and had for more than ten years prior to the commencement of this suit anf more than ten years prior to April 28th, 1904, been in actual, open, notorious, exclusive,
7 continuous and hostile possession of said land and the whole thereof in good faith, under a claim of right thereto and of ownership thereof and holding the same as aforesaid adversely to the claim of plaintiff and said Railroad company, and they and their predecessors in interest have and had for more than ten years prior to April 28th, 1904, and the commencement of this suit and during their said possession of said land, in good faith and in the belief that they were the owners thereof with the knowledge of plaintiff and the Northern Pacific Railroad Company, made valuable permanent improvements on said land, consisting of the following, which are still upon said land to-wit:

One 7 room one story house located south of block nine (9) of Van Duzen's Addition to Tacoma and connected with "J" Street by a cement sidewalk, said house being of the value, apart from said land of $850.00, and said sidewalk being of the value of $35.00; one bunk-house about 12′ x 30 situated about half in Boundary street produced southward, of the reasonable value, apart from said land, of $75.00; one (1) chicken house east of the east side of Boundary street produced and near the spring on said property, of the reasonable value apart from said land of $100.00; one (1) two-story barn and sheds in connection, situated on Boundary Street produced southward, of the reasonable value, apart from said land of $300.00; cribbing and filling from "J" Street to the west boundary of the N. E. ¼ of the S. E. ¼ of Sec. 8 Township 20 N. Range 3 East, of the reasonable value, apart from said land of $500.00; and fencing of the value of $50.00 apart from said land; and that the value of said land, apart from said improvements is $600.00.

That neither plaintiff nor the Northern Pacific Railroad Company has or had at any time prior to shortly before the commencement of this suit ever made any claim to said land or any interest therein or to the right of possession thereof but stood by and
8 without protest or objection permitted said improvements to be made and erected and was and is estopped from now asserting any right, title or interest therein.

Wherefore, defendants pray that they be adjudged to be the owners in fee simple of the property described in plaintiff's complaint and entitled to possession thereof; that their title to said property and the whole thereof be quieted against the claims of the plaintiff, and that plaintiff be enjoined and restrained from asserting any right or title thereto or any part thereof; and for such other and further relief as to the court may seem meet and equitable.

HUFFER, HAYDEN & HAMILTON,
Attorneys for Defendants.

P. O. Address: 411 Fidelity Bldg., Tacoma, Wash.

STATE OF WASHINGTON,
County of Pierce, ss:

P. J. Concannon, being first duly sworn, deposes and says: That he — one of the defendants in the above entitled action, and makes this verification for and on behalf of himself and his co-defendant herein: that he has read the foregoing second amended answer, knows the contents thereof and believes the same to be true.

P. J. CONCANNON.

Subscribed and sworn to before me this 14th day of January, A. D. 1911.

F. A. HUFFER,
Notary Public in and for the State of Washington,
Residing at Tacoma, Pierce County, said State.

Due service of the within 2nd amended answer is hereby admitted this 14th day of January, 1911.

GEO. T. REID,
Attorney for Plaintiff.

Filed in open court, Dept. No. 4, Jan. 16, 1911.
E. F. McKENZIE, *Clerk,*
By WALKER, *Deputy.*

9 In the Superior Court of the State of Washington in and for Pierce County.

No. 28618.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
P. J. CONCANNON et ux., Defendants.

Reply.

Comes now the plaintiff and replies to the amended answer of the defendants as follows:

1.

Plaintiff denies each and every allegation contained in the I, II, III, and IV affirmative defenses in said amended answer contained.

GEO. T. REID,
J. W. QUICK,
L. B. DA PONTE,
Attorneys for Plaintiff.

STATE OF WASHINGTON,
County of Pierce, ss:

L. B. da Ponte, being first duly sworn, on oath deposes and says: that he is one of the attorneys for the plaintiff in the above entitled action; that the same is a foreign corporation and that he makes this verification for and in behalf of said corporation, being authorized so to do; that he has read the foregoing reply, knows the contents thereof and believes the same to be true.

L. B. DA PONTE.

Subscribed and sworn to before me this 30 day of November, 1910.

F. M. HARSHBERGER,
Notary Public in and for the State of Washington,
Residing at Tacoma, in said County.

Service of the foregoing reply accepted this 30th day of November, 1910.

10 HUFFER, HAYDEN & HAMILTON,
Attorneys for Def'ts.

Filed in Superior Court Jan. 4, 1911.
J. F. LIBBY, *Clerk,*
By B. C. O., *Deputy.*

11 In the Superior Court of the State of Washington in and for the County of Pierce.

No. 28618.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
P. J. CONCANNON and ELLA F. CONCANNON, Defendants.

Judgment.

This cause came on regularly for trial on the 16th day of January, 1911, the time fixed by the court for the trial of the same, before the court without a jury, a jury having been waived, together with the cases of Northern Pacific Railway Company vs. Mary Classen No. 28320 and Northern Pacific Railway Company vs. R. Shade Co. 28619, this cause and the two last named causes having, by agreement of the parties, been consolidated for the purposes of trial with the understanding that all the proceedings and evidence in any of said causes should be deemed evidence and proceedings in all of them, plaintiff in this case and in said other causes appearing by Messrs. G. T. Reid, J. W. Quick, and L. B. da Ponte, its attorneys, the defendants Concannon and wife, appearing by Messrs. Huffer, Hayden & Hamilton, their attorneys, the defendant Mary Classen appearing by Messrs. Stallcup & Keyes her attorneys, and the defendants R. Shade and wife appearing by Messrs. Gordon & Askern, their attorneys; and, by stipulation of plaintiffs and defendants Concannon, all of that portion of the premises described in plaintiff's amended complaint not situated in the Northeast quarter of the southeast quarter (N. E. ¼ of S. E. ¼) of section 8 below mentioned having been eliminated from this case and this case having been confined only to that portion of said premises situated in said Northeast quarter, and the court having heard the evidence and argu-

12 ment of counsel and having found that the allegations contained in the answer of the defendants Concannon are — and that plaintiff had not, at the time of the commencement of this suit, and has not now, any right, title or interest in or to the premises in controversy herein described in plaintiff's complaint and hereinafter described, and is not entitled to the possession of said

premises or any part thereof, and all the parties having waived the signing or making of Findings of Fact and Conclusions of Law and consenting that judgment might be entered without signing or making such findings or conclusions, and the court now being fully advised in the premises;

It is ordered, adjudged and decreed, that the defendants P. J. Concannon and Ella F. Concannon, were, at the time of the commencement of this suit, and now are the owners in fee simple of the premises hereinafter described, in the possession and entitled to the possession thereof, and that plaintiff had not, at the time of the commencement of this suit, nor has it now, any right, title or interest in or to said premises or any part thereof or any right the possession of the same or any part thereof and no right-of-way on, through or over the same.

It is further ordered, adjudged and decreed, that the plaintiff recover and take nothing by this action.

It is further Ordered, Adjudged and Decreed that the title of the defendants, P. J. Concannon and Ella F. Concannon in and to said premises and every part thereof be, and the same is hereby quieted against any and all claims of plaintiff, and the plaintiff be, and it is hereby, barred from any right, title or interest in or to said premises or any part thereof, and is hereby enjoined and restrained from asserting any right, title or interest therein or thereto or any part thereof.

The said premises affected by this judgment are more particularly described as follows:

All that portion of the following described parcel of land
13 situated in the county of Pierce, state of Washington, and in the northeast quarter of the southeast quarter of section eight (8) township twenty (20) North, Range three (3) East W. M., to-wit:

Commencing at a point which is south no degrees thirty-seven minutes east (S.)* 37′ E) along east line of block nine (9) Van Duzen's Addition, four hundred twenty five (425) feet from northeast corner block nine (9) Van Duzen's Addition to New Tacoma, W. T., according to the plat thereof filed for record in office of County Auditor of Pierce County, W. T., on the 18th day of September, 1883, and now of record in Volume 1, of Plats, at page 64 of Records in office of county Auditor, Pierce county, Washington, being place beginning. Said point being south no degrees thirty-seven minutes east (S. 0* 37′ E) a distance twenty four and ninety-two hundredths (24.92) feet along east line block nine (9) Van Duzen's Addition from intersection of Northern Pacific right of way with east line of said block nine (9); thence south eighty-nine degrees twenty-three minutes west (98* 23′ W) seventy six and forty nine hundredths (76.49) feet, along south line block nine (9) Van Duzen's Addition to intersection with Northern Pacific right of way; thence south seventy eight degrees one minute west (S. 78* 1′ W) thirty one and twenty six hundredths (31.26) feet; thence south seventy nine degrees forty five minutes west (S. 79* 45′ W) one hundred twenty eight and thirty two hundredths (128.32) feet;

thence south no degrees fifteen minutes west (S. 0* 15′ W) fifty two and five tenths (52.5) feet, to edge of bluff, thence north eight-six degrees fifty four minutes east (N. 86* 54′ E) along edge of bluff, one hundred fifteen and one tenth (115.1) feet; thence north seventy four degrees fifty four minutes east (N. 74* 54′ E) one hundred twenty three and one tenth (123.1) feet; thence north no degrees thirty seven minutes west (0* 37′ WW) forty four and one tenth (44.1) feet, to place of beginning.

It is further ordered, adjudged and decreed, that the defendants P. J. Concannon and Ella F. Concannon, do have and
14 recover of and from plaintiff their costs and disbursements herein. Dated this 23rd day of March, 1911.

ERNEST M. CARD, *Judge.*

O. K. as to form.
GEO. T. REID,
J. W. QUICK,
L. B. DA PONTE,
Att'y- for Pl'ff.

Entered Ex. Doc. No. 25, Page 300.
Ent. Jour. 136, Page 102, Mar. 23, 1911.

Filed in Superior Court Mar. 23, 1911.
E. F. McKENZIE, *Clerk,*
By G. F. M., *Deputy.*

In the Superior Court of the State of Washington in and for Pierce County.

(Consolidated Cases.)

No. 28619.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
R. SHADE et ux., Defendant.

No. 28618.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
P. J. CONCANNON et ux., Defendants.

No. 28320.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
MARY CLASSEN, Defendant.

Notice of Appeal.

To the above named defendants and Huffer, Hayden & Hamilton, attorneys for P. J. Concannon and wife; Stallcup & Keyes, attorneys for Mary Classen, and Gordon, Easterday & Askern, attorneys for R. Shade and wife:

You and each of you are hereby notified that the above named plaintiff, Northern Pacific Railway Company, a corporation, appeals

to the Supreme Court of the State of Washington, from that part of each of said judgments entered herein in favor of the defendants and against the plaintiff, judgment in favor of P. J. Concannon and wife, being entered in cause No. 28618 on the 23rd day of March, 1911; and said judgment in favor of R. Shade and wife being entered in cause No. 28619 on the 22nd day of March, 1911; and said judgment in favor of Mary Classen being entered in cause No. 28320 on the 22nd day of March, 1911.

GEO. T. REID,
J. W. QUICK,
L. B. DA PONTE,
Attorneys for Plaintiff, Northern Pacific Ry. Co.

Entered Ex. Doc. No. 25, Page 299.
Ent. Jour. No. 136, Page 269.
June 8, 1911.

Received a copy of the foregoing Notice of Appeal this 8th day of June, 1911.

STALLCUP & KEYES,
Attorneys for Mary Classen.
HUFFER, HAYDEN & HAMILTON,
Attorneys for Concannon & Wife.
GORDON, EASTERDAY & ASKERN,
Attorneys for Shade & Wife.

Filed in Superior Court Jun- 8, 1911.
E. F. McKENZIE, *Clerk,*
By G. F. M., *Deputy.*

15 In the Superior Court of the State of Washington in and for Pierce County.

(Consolidated Cases.)

No. 28619.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
R. SHADE et ux., Defendant.

No. 28618.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
P. J. CONCANNON et ux., Defendants.

No. 28320.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
MARY CLASSEN, Defendant.

Appeal Bond.

Know all men by these presents:—That we, Northern Pacific Railway Company, a corporation, plaintiff above named as principal,

and the National Surety Company, a corporation organized under the laws of the State of New York and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the defendants above named, and each of them, in the just and full sum of Eight Hundred dollars ($800.00) for which sum, well and truly to be paid, we bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 8th day of June, 1911.

The condition of this obligation is such, that whereas, part of each of the judgments entered in the above entitled causes was in favor of the defendants and against the plaintiff, and whereas,
16 said plaintiff desires to appeal, to the Supreme Court of the State of Washington from so much of each of said judgments as is against it;

Now, therefore, if the said plaintiff shall pay to the said defendants, and each of them, all costs and damages that may be awarded against it on the appeal, or on the dismissal thereof, then this obligation shall be void, otherwise to remain in full force and effect.

In witness whereof, the said Northern Pacific Railway Company, as principal, and the said National Surety Company as surety, have caused these presents to be duly executed the day and year above written.

NORTHERN PACIFIC RAILWAY COMPANY,
By GEO. T. REID, *Its Attorney.*

[CORPORATE SEAL.]

NATIONAL SURETY COMPANY,
By W. H. OPIE, *Attorney in Fact.*

Entered Ex. Doc. No. 25, Page 299.
Entered Book of Bonds No. K, Page 432—June 8, 1911.

Received a copy of the foregoing Bond this 8th day of June, 1911.

STALLCUP & KEYES,
Attorneys for Mary Classen.
HUFFER, HAYDEN & HAMILTON,
Attorneys for Concannon & Wife.
GORDON, EASTERDAY & ASKERN,
Attorneys for Shade & Wife.

Filed in Superior Court Jun- 8, 1911.

E. F. McKENZIE, *Clerk,*
By G. F. M., *Deputy.*

17 70-86910.
M. L.—246249.
B.
M. F. H.

Department of the Interior.

General Land Office.

WASHINGTON, D. C., November 11, 1910.

I hereby certify that the annexed copy of so much of the tract-book as relates to the E. ½ of the S. E. ¼ of Section 8, Township 20 N. R., 3, E. Washington, is a true and literal exemplification of the same in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of his office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

(Here follows poster, marked page 18.)

Description of tract.	Contents.				Rat
Part of Section.	Sec.	Twp.	Rge.	Acres.	100ths.
Pa. 41, E. ½ S. E. ¼ of	8	20	3	80	..
	"	"	"	80	..
	"	"	"	80	..

Copy.

Township No. 20 N., Range No. 3 E.

e per acre.		Purchase money.					
Dollars.	Cents.	Dollars.	Cents.	Name of the purchaser.	Date of sale.	Number of receipt of certificate of purchase.	To whom patented.
2	50	200	..	Walter C. Wallace	July 11, 1874	4926	Act June 8, '72. Canceled May 11, '74. "G."
..	..	10	..	Joseph S. Vansant	Aug. 15, 1873	1917	A. 1862. Canceled July 19, 1873.
..	..	10	..	Alexander Dumas	Oct. 16, 1872	1695	

19 In the Superior Court of the State of Washington in and for the County of Pierce.

No. 28618.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
P. J. CONCANNON and JANE DOE CONCANNON, His Wife, Whose True Christian Name is to This Plaintiff Unknown, Defendants.

No. 28619.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
R. SHADE and JANE DOE SHADE, His Wife, Whose True Christian Name is to This Plaintiff Unknown, Defendants.

Number 28320.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
MARY CLASSEN, Defendant.

Transcript of Testimony and Proceedings.

20 Be it remembered, That heretofore, and on, to-wit, January 16th. A. D. 1911, the above entitled causes came regularly on for trial before the Honorable Ernest M. Card, one of the Judges of the Superior Court of Pierce County, State of Washington.

The plaintiff herein appearing and being represented by its attorneys and counsel, Messrs. Reid, Quick, and Da Ponte, and

The defendants, P. J. Concannon and Jane Doe Concannon appearing and being represented by their attorneys and counsel, Messrs. Huffer, Hayden & Hamilton, and

The defendants R. Shade and Jane Doe Shade, appearing and being represented by their attorneys and counsel, Messrs. Gordon & Askern, and

The defendant Mary Classen appearing and being represented by her attorneys and counsel, Messrs. Stallcup & Keyes.

And there*fore*, the following proceedings were had and done and the following testimony introduced upon said trial, as follows, to-wit:

21 The COURT: As I understand it there are to be three cases tried together; the Classen, Concannon and Thatcher. Is there another case.

Mr. GORDON: There is the R. Shade case.

The COURT: The Northern Pacific Railway Company against R. Shade?

Mr. GORDON: Yes, your Honor.

Mr. HUFFER: I believe the Thatcher case has been settled.

Mr. DA PONTE: There has been an amended answer, I believe, served. I do not know whether that will apply to them.

Mr. GORDON: That is the understanding.

The COURT: The reply will be considered as made to the amended answer.

Mr. KEYES: And also in the Classen case, that the original answer may stand as the answer to the amended complaint?

The COURT: It may be so ordered.

It is stipulated in open court between plaintiff and the defendants Concannon and wife that all that portion of the premises described in plaintiff's amended complaint not situated in the N. E. quarter of S. E. qquarter of Sec. 8, T. 20 N. Range 3 E. be eliminate from this case and that this case be confined solely to that portion of said premises situated in said N. E. quarter of said S. E. quarter of said section.

And thereupon. to maintain the issues on its part, the plaintiff introduced the following testimony:

22 Mr. A. F. STOTLER, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

(By Mr. DA PONTE:)

Q. What is your name?
A. A. F. Stotler.
Q. What is your business
A. Civil Engineer.
Q. Do you work for the Northern Pacific?
A. Yes, sir.
Q. Assistant engineer?
A. Yes, sir.
Q. Assistant division engineer is it?
A. No; assistant engineer.
Q. Are you familiar with these lands in controversy here; known as the Center street encroachment cases?
A. Yes, sir.
Q. You recently made a survey of the lands?
A. Yes, sir.
Q. And did you make a map?
A. Under my directions a map was made.
Q. The field notes in the amended complaints; are those the field notes of your survey?
A. Yes, sir.
Q. Did you make a map at that time?
A. Made a map—that is, the outline which this map is made from (indicating map on table).
Q. Is this the result of your investigation there?
A. Yes, sir.
Q. I will ask you to state to the court how you identified and located and drew the property described on the map, and the

field notes; the encroachments as you have them there?
23 *notes; the encroachments as you have them there.*
A. Well the center line—I mean the right-of-way line. was staked out on the ground, wherever we came in, including any land occupied by the encreachers; from there we followed discription by meets and bounds around the entire land occupied by them.
Q. Was it improved around the land?
A. Any land they were occupying was considered as improved land.
Q. You mean by that fences?
A. Fences, clothes lines, sheds, trees. kept up by them, or buildings made by them.
Q. In other words, wherever any evidence on the ground of use or occupancy by these parties was, you ran a line accordingly?
A. Yes, sir.
Q. I will ask you to state whether there was any deeds or other instruments of record in the name of these parties from which any other description could have been obtained?

Mr. HUFFER: We object to that as incompetent, irrelevant and immaterial.
Mr. DA PONTE: I believe it is conceded there was no matters of record from which descriptions could be obtained, isn't it.
Mr. HUFFER: No deeds of record in our case, the Concannon case.
The COURT: Objection overruled.

Q. The question is whether you know of any deeds of record from which any other description could have been obtained?
A. No, I do not.

Mr. DA PONTE: I will offer this map in evidence, your Honor, and I ask leave that it may be withdrawn in case we need it in other cases. It covers a good many tracts except that involved here. Copies will be supplied if you want.
Mr. HUFFER: With the understanding you are to supply a
24 copy if it is withdrawn?
Mr. DA PONTE: Yes.
Whereupon, said map was received in evidence by the Court, without objection. and marked as Plaintiff's Exhibit "A".

Q. Mr. Stotler, were those strips—(encroachments, as I will call them), on the ground within the right-of-way of the Northern Pacific Railway Company?

Mr. GORDON: We object to that on the part of Shade on the ground that it is going into a conclusion. He may state the facts.
Mr. HUFFER: Concannon joins in the objection. "Right-of-way" does not mean anything.
Mr. DA PONTE: I am referring to the 400 foot right-of-way now. I will withdraw the question.

Q. State how far from the center line of the Northern Pacific the track is constructed and located over and across this section eight, and in the northeast of the southeast quarter (referring to map)?

A. They are within two hundred feet from the center line of the right-of-way.

Q. Could you note on there the 100 foot line, Mr. Stotler?

A. I would have to draw a radius curve a distance of 100 feet from the center line of the right-of-way.

Q. It would be then a paral-el strip from the center line,—between that and the outer 200 foot line?

A. Yes, sir. I could take it down to the county engineer's office and put it on.

Q. Now, Mr. Stotler, how long has that line been constructed on that 400 foot right of way?

Mr. HUFFER: We object to that, as it is not the best evidence, and it is not shown that the witness knows.

The COURT: Objection overruled.

Mr. HUFFER: We take an exception.

25 Mr. GORDON: Note an exception for defendant Shade.

Mr. GORDON: We wish to have it understood your Honor that when an objection is made by one of the defendants, that each of the defendants may take advantage of it, and shall be considered an objection by all the defendants.

Mr. DA PONTE: That is all right.

The WITNESS: Well, that was from the records I have gone over; it was 1876, the originally constructed line.

Q. You are speaking now from memory?

A. From memory.

Q. You do not know exactly when it was constructed?

A. No; I believe we have a map there that shows definitely.

Cross-examination.

By Mr. HUFFER:

Q. Referring, Mr. Stotler, to the map, did you find any part of the land marked here "P. J. Concannon" involved in this case, to be within the strip 100 feet wide from the center of the line?

A. I have not made the survey for the 100 foot strip; that takes everything within the 200 foot strip.

Q. You do not know whether it is within the 100 foot limit or not from the center line?

A. No, sir.

Q. You could tell by running a line?

A. Yes, very easily; you can see very closely, that 100 foot strip would be here (indicating), a paral-el strip.

Q. According to your map all the land here which you claim from Concannon is not within the 100 foot strip; that is, between the line which marks the 100 foot limit and the line which marks the 200 foot limit?

26 A. Within the 200 foot limit?

Q. Between the line which marks the 100 foot limit and the line which marks the 200 foot limit?

A. That could be better determined, I should judge, by drawing a curve paral-el to the two lines; it shows for itself there.

Q. Speaking from your plat, the Concannon land is all between the line which marks the 100 foot limit from the center of the track and the line that marks the 200 foot limit from the center of the track?

A. I judge it would be, from the plat, That is self-evident on the map there, if you will notice (referring to Exhibit "A").

Q. From which one of the tracks did you measure as being the center of the right of way?

A. It is neither; the line had been divided when they built the double track.

Q. After the revision, where is the center line of the right-of-way with respect to the two tracks?

A. It varies—three feet on one side—varies within the limits of about seven to eight feet; I think about seven feet.

Q. Where is it located with reference to the Concannon property?

A. I should say the center line of the old right of way follows very closely to the north rail of the track leading to Tacoma.

Q. The north rail?

A. Yes, sir.

Q. Is that the south rail of the north tracks?

A. The north rail of the south track.

Redirect examination.

(By Mr. Da Ponte:)

Q. That is the center line of the track as originally constructed, as shown on this map?

A. Yes, sir.

27 Mr. Da Ponte: Take that map down and put on the 100 foot line for convenience.

(Witness leaves court room with map.)

Mr. Da Ponte: I offer in evidence a certified copy of the map filed in the general land office and certificates showing the construction of the Northern Pacific Railroad Company's line over and across the land in controversy. This is an original document and I will ask leave to substitute copies of such part of it as applies to this case. This is a certified copy, your Honor, of the map of definite location, the Northern Pacific Railroad Company's constructed line, the certificate reading as follows: "Territory of Washington, County of Cowlitz: ss:

Henry C. Hale, of Kalama, in said County and Territory, being duly sworn, deposeth and says: That he is the engineer in charge of the said railroad from Kalama to Tacoma, being *fro* N. P. R. R. Pacific Division section of 40-1/10th miles, as shown by the line of route in connection with the lines of the published surveys on this map; that it has been completed and equipped as required by law, and that this line of route shows the correct location of the said railroad. Henry C. Hale, Engineer in charge. Sworn and subscribed this 5th day of March, 1874 before me Alleck C. Smith, Notary Public.

It is hereby certified that Henry C. Hale is the engineer in charge

of the N. P. R. R. Pacific Division, and that the location of the road as represented on this map is correct and approved by the company; and also that the said portion of the said road has been completed and equipped in all respects as required by law. (Signed) John W. Sprague, General Superintendent."

Mr. GORDON: What is the date of the certificate, Mr. Da Ponte?

Mr. DA PONTE: The 5th day of March, 1874. The map was made 1873.

Mr. HUFFER: That seems to be merely the verification of the engineer.

28 Mr. DA PONTE: This is a certified copy. Here is the certificate. (Reading:) "Department of the Interior, General Land Office, Washington, D. C. October 2, 1907. I hereby certify that the annexed map is a true and literal exemplification of the original now on file in this office. In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, the day and year above written. R. A. Ballinger, Commissioner of the General Land Office."

The COURT: This map is offered in evidence.

Mr. DA PONTE: That part of it which covers the section in controversy and the certificates. The land in controversy covers the section from Tenino to Tacoma.

The COURT: If there is no objection, this map will be admitted showing the land in controversy.

Whereupon said map was received in evidence and marked as Plaintiff's Exhibit "B".

Mr. DA PONTE: I have a certified copy from the *track* books showing the entries made on this section, involving the northeast of the southeast. The only uncancelled entry is the east half of the southeast quarter, township 23, 80 acres, which brought $2.50 purchase money or $200.00. The name of the purchaser was Walter C. Wallace; date of sale, July 7, 1874; number of receipt 4926; there are some other entries made about the same time; One made in 1873, one in 1872, which it cancelled. I want to offer this in evidence with leave to substitute a copy. It is certified by the recorder of the general land office.

Mr. HUFFER: What date is that?

Mr. DA PONTE: July 11, 1874—the date of the sale I suppose.

The COURT: If there is no objection the document will

29 be admitted in evidence.

Whereupon said document was received in evidence, without objection, and marked as Plaintiff's Exhibit "C".

Mr. DA PONTE: I had a certified copy of a letter that that map which I offered in evidence was the only map of a definite location filed in that office. That may be in some other file, as I do not find it among these papers. It sets forth that it was the only map ever filed in the office of the commissioner. In other words, the road was located there by construction.

The COURT: No other map of any sort filed?

Mr. DA PONTE: There may have been one representing the general route. I think this said there was no map of any kind filed. I had that yesterday. I will produce that letter *if* it is worth while.

Mr. HUFFER: It is satisfactory so far as Mr. Concannon is concerned.

(No objection by any of the defendants.)

30 Mr. W. C. SMITH, a witness produced on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

(By Mr. DA PONTE:)

Q. What is your name?
A. W. C. Smith.
Q. You work for the Northern Pacific?
A. I do.
Q. Are you chief clerk of the assistant tax commissioner?
A. I am.
Q. Has the Northern Pacific Railroad Company paid taxes on this section 8, township 20, North, Range 3, east, right along?
A. It has paid taxes on its right of way through there; assessed on the rolls by the lineal foot—the law as I understand it not taking into consideration the width of the right-of-way.
Q. Is that the law of assessment uniformly practiced?
A. It is.
Q. A certain number of feet of lineal right-of-way?
A. Yes, sir; in assessment district Number One, in the City of Tacoma, a certain number of lineal feet of main track.
Q. Are any taxes being claimed by Pierce County or any other governing body in the State against the Northern Pacific for taxes on this land?
A. They are all paid.

Mr. GORDON: I object to that, "taxes on the land." He should say taxes on the right-of-way.

Mr. DA PONTE: Make it "right of way".

Q. (Read by the reporter.) Are any taxes being claimed by Pierce County or any other governing body in the State against the Northern Pacific for taxes on this right-of-way?

The COURT: Objection sustained to the question in regard to the land.

(By Mr. GORDON:)

Q. Have all the taxes assessed on this right of way been paid by the company?
31 A. Yes.

(Witness excused.)

Mr. A. F. STOTLER, being recalled by the plaintiff, testified as follows:

Direct examination.

(By Mr. DA PONTE:)

Q. Mark on that the 100 foot line as defined from the 200 foot line. (Referring to Exhibit "A.")

(Witness does so.)

Q. Now, Mr. Stotler, this should be plaintiff's Exhibit "A", does this show the construction of the railroad or its right of way as constructed according to that map?

A. As near as I can run it to it.

Q. What do you mean by that?

A. For four yards you run the line there, being this point—the point above this; the point below this, two yards below this (indicating on Exhibit "A").

Q. You mean as near as engineering science can get it?

A. Yes, sir.

Cross-examination.

(By Mr. HUFFER:)

Q. Designate the point?

A. This point is a matter of record. Here this point up here established by Mr. C. O. Bean in 1889.

Q. The point of the east line of the northwest quarter—— (Interrupted.)

A. No, it is not the quarter; it is where the east line of the northwest quarter of the southeast quarter Section 8, Town-
32 ship 20, Range 3 East W. M. intersects with the center line of the right of way, along the distance given here.

Q. Mark the point with a cross.

(Witness does so.)

Q. Allowing for any uncertainty which inevitably arises through running these lines, what could be the utmost possible deviation between the center line as shown on Exhibit A, and the center line shown on the map of definite location?

A. Between seven and eight feet.

Q. The utmost that could exist?

A. Yes.

Q. As far as you know and believe it shows it exactly?

A. The same location as the original notes.

(By Mr. GORDON:)

Q. From what data did you reach the conclusion that the north rail of the south track represents the center line of the track as originally constructed?

A. It is a matter of record. I guess this Van Dusen's Addition

has been filed in the Auditor's office and distance given; I do not know if it is from the quarter corner or block corner.

Q. It is not from any physical observation or indication?

A. No, I think it is the block corner.

Q. Your source of information on that subject then is what?

A. I believe it is either from the block corner or quarter corner.

Q. As is shown by what?

A. As of Van Dusen's Add. to the city of Tacoma, map filed.

Q. Nothing on the right-of-way at the present time observable from which the location of the main track as originally constructed could be ascertained?

A. The point where there is a reservoir there—I do not have
33 familiarity with the ground about—I believe from this Van Dusen's Add. line to, I should judge, about 180 feet, maybe more or less, this point there running out around, has never changed. (Indicating.) Evidence of the old line there, and evidence of that old bridge right there (indicating all along).

Q. What is the distance between the tracks,—between the north rail of the south track and the south rail of the north track?

A. Well it is in the neighborhood of about,—it varies,—probably be eight and nine feet.

Q. Can you from the map state the difference, or from any other information that you have, state the distance between the rails at the point opposite the center of the Shade fence, as shown on the map?

A. Now, which fence?

Q. This map does not show the location of the present tracks?

A. No, sir.

Q. How many tracks are there now?

A. Two.

Q. When was the double track system inaugurated at that point?

A. First operated?

Q. Yes?

A. From the records I have gone over, 1891, in that year.

Q. And you say that the distance between the tracks varies about how much?

A. Between the tracks as they exist now?

Q. Yes?

A. They vary from six inches to three.

Q. Not over three to six inches, is that the idea?

A. It is generally three to six inches.

Q. Would not exceed three to six inches at any point?

A. No.

34 Q. This represents the Shade place (indicating).

A. Yes.

Q. This in pink?

A. Yes.

Q. And what is this large square, is that the residence?

A. Yes.

Q. What is this little—— (indicating)?

A. Somewhat of a shed.

Q. This is enclosed by a fence, the Shade place?
A. Yes, sir.

(By Mr. HUFFER:)

Q. Referring then, Mr. Stotler, to this Concannon property, the big square here on the east and immediately south of block nine in Van Dusen's Addition represents what?
A. Why, represents a dwelling.
Q. Can you mark that in some distinctive manner?
A. I will mark the dwelling "A". (Witness does so.)
Q. The two paral-el*l* lines running off to the east of the dwelling represent what?
A. Cement walk.
Q. The paral-el*l* lines running at right angles to the cement walk at the west line of J street represent what?
A. Cement sidewalk.
Q. We have another structure in the southwest or opposite the southwest corner of block nine Van Dusen's Addition; what does that represent,—the lower corner of it being cut off by the outer boundary of the 200 foot strip?
A. Well,—call it pretty near anything; shed, I suppose, it would go under that heading.
Q. And this structure that is within the—— (Interrupted.)

Mr. DA PONTE: I object to this as not cross-examination.
35 I do not want his testimony to go in as a part of my case.
The COURT: Objection overruled; exception allowed.

Q. And this structure which is situated in Boundary street, due southward, the large square structure; what does that represent?
A. Combination, shed and barn.
Q. Then the structure below and between the little house and the barn just referred to, what is that?
A. Well that is in the nature of a chicken shed.
Q. Did you notice that there was a fence still further south of the property here marked the Concannon property, south of the south boundary of the track, as you have it marked on the map, fence and cribbing?
A. The cribbing does not project up that far.
Q. The cribbing does not project up as far north as the line you have marked as the south line of the Concannon property?
A. There is a cribbing there; I do not remember it projects within the limits of the occupied or improved land.
Q. Where is the cribbing referred to with reference to the south boundary of the Concannon property, as you have it marked on the map?
A. I have no crib marked there at all.
Q. Where is the cribbing as located?
A. Started that fence there when the street was graded. I did not attempt to locate the cribbing.
Q. Did you notice the fence along there?
A. Without making a careful examination you could not determine indications of a kept-up fence; there was no improvements there

in that fence; the fence has been there probably on the side of the hill and slid down.

Q. That is a theory of yours?

A. No, sir; indications on the ground there of a slide. In
36 fact I had a little of it myself.

Q. Is not the fence immediately south of the cribbing?

A. No, sir.

Q. Where is it located then with reference to the cribbing?

A. Well, we did not locate the cribbing at all.

(By Mr. KEYES:)

Q. I want to ask you a few questions about this Classen property; just state what those two squares indicate? (Referring to the map marked Exhibit "A".)

A. The upper one is a dwelling and the lower one is a covered shed, immediately south.

Q. And this little square off here?

A. Outhouse.

Q. And did you find any fence there?

A. Yes, sir.

Q. It is completely fenced?

A. Yes, sir.

Q. Did you note any other improvements in the way of trees or such like, being planted out?

A. There was trees there.

Q. What character,—fruit trees?

A. I presume they are fruit trees.

Q. This portion here planted out in fruit trees? (Indicating.)

A. I would not say the lower portion, just south of the dwelling here, from the outhouse over it is all on the bluff there; there is no fruit trees, no improvements, there with the exception of the fence.

Q. There is quite a bluff just at that point isn't it?

A. There is; it is irregular; it is pretty hard to follow around.

Q. As a matter of engineering, would you consider it prac-
37 tical that the railroad company would ever use this portion of its right of way?

Mr. DA PONTE: I object to that as immaterial.

The COURT: Objection will be sustained.

Mr. KEYES: Note an exception.

The COURT: Exception allowed.

Redirect examination.

By Mr. DA PONTE:

Q. Mr. Stotler, will you *place* state the nature of the Concannon improvements; what the value of them is, and describe the kind of house and kind of improvements that are there?

A. Well the barn on the west end there, southwest corner, it is a very crude appair; I should judge it was about in the neighborhood, first cost in the neighborhood of two hundred dollars, and the shed

there adjoining it to the east is a chicken shed probably of the value of twenty dollars,—fifteen or twenty dollars; the dwelling is a story and—— (Interrupted.)

Mr. HUFFER: Your Honor, I object to this. I was busy at the time the question was asked or should have done so then. It is not a part of this case. He is not an expert on values. It is not a part of his case in chief.

The COURT: Objection overruled.

Mr. HUFFER: I object also on the ground the witness is incompetent to testify, not being an expert.

The COURT: The objection will be overruled. Exception allowed.

The WITNESS (continuing answer): The dwelling there is a story and a half, and I should judge it is,—let us see,—it is about between 50 and 60 feet long by about 20 feet wide; its first cost is in the neighborhood I should judge of about five hundred dollars.

Q. Is it painted?

38 A. Well, it is painted.

Mr. HUFFER: Of course our objection runs through all of this, as to the incompetency of it, and the witness not being qualified to testify.

A. I said it is painted.

The COURT: The objection is overruled; exception allowed.

Q. You think all the improvements first cost seven hundred and fifty dollars?

A. Yes, sir.

Q. What would be the present worth of them, do you think—are they in good condition?

A. Fair condition.

Q. How old are they, in the appearance of them?

A. From the appearance of the barn it is in the neighborhood of about five years, and the dwelling I should judge is about twelve years.

Q. Now that fence,—is there any fence anywhere there Mr. Stotler?

A. There is a fence on the south line of the block nine; you can see that.

Q. Is the Concannon property fenced in in any way?

A. It is fenced in on the line you see here, drawn from the chicken coop over here (indicating).

Q. That runs over to the other quarter does it?

A. Yes, the fence runs over to the northwest quarter.

Q. Any fence on this side (indicating)?

A. No,—I mean on the southeast quarter.

Q. Any fence down here?

A. None whatever.

Q. Any fence on this side (indicating)?

A. No fence on that side.

Q. That is really the only fence on that land (indicating).
39 A. The only fence is this fence on the north side, and then there is a fence in this other disputed property, on this side here (indicating).
Q. The fence counsel talked about that slid down the hill, what fences there are on this land in controversy.
A. Following this south line here to the chicken house, it goes off on a 90 degree angle there over to the dwelling.
Q. Mark the fence along there, will you?
(Witness draws line on map.)
Q. Where do the fences go?
A. This fence here,—I do not know it is a fence; it is not like the other fences, it is on the ground.
Q. What about that cribbing you speak of there, what is that?
A. The cribbing is on the J street brattice there; I should judge it was to take care of the top of the fill.
Q. Do you know who put it there?
A. I do not.
Q. Would it be in the street?
A. Cribbing in the street. May be some other on Concannon's there; supposed to take care of the fill,—liable to slough over to the side.
Q. Any fill on the land in controversy? Whereabouts is it?
A. In this vicinity here (indicating).
Q. Does it follow the line of the street or does it run up right to his land?
A. Follows the line of the street, I think.
Q. The fence counsel talked about that slide down the hill, what was that?
A. Three or four pickets sticking up,—it has a tendency to go down the hill.
Q. Where did it come from?
40 A. I presume right from the brow of the bluff there, I do not believe that is in this disputed land at all.
Q. You said it slid down the hill there?
A. This fence all slid down; you can see the bluff there.
Q. Coming down to the Shade premises; is there any fence around the Shade premises?
A. Enclosed all around it.
Q. What is the value of that house?

Mr. GORDON: I object to that as the witness has not shown that he knows anything about the value.

A. You mean the value?

Mr. GORDON: The witness has not shown that he is qualified to testify to values. It is highly material that he should first show familiarity with values.
The COURT: Objection sustained; exception allowed.

Q. Go ahead and describe the nature of that improvement there?
A. Why the dwelling is two stories; in the neighborhood of forty

by I should think,—forty by twenty-four; not painted; and I think it is shingled half-way, the first section, the first story. Now the shed is a very crude affair, so far as it goes——

Q. What shed are you talking about?

A. The one just south of that.

Q. I will ask you to state whether or not that house is what is generally termed a shack or shanty?

Mr. GORDON: I object to that; not within the range of expert testimony; let him describe it. He has a right to describe in a general way what it is.

The COURT: Objection overruled.

A. Why it is made out of common one inch by twelve planks or boards; they are not placed in any workmanship manner at all, and the fact is that it has no door, and the roof would not protect anything that you would store in there from rain.

41 Q. You mean the dwelling now?

A. No, I am speaking of the shed.

Q. I asked about the dwelling; whether you would term that a shack or a shanty.

Mr. GORDON: I object to that as leading. I withdraw the objection.

A. Why I do not know I should call it a dwelling; it has the appearance of a dwelling.

Q. Have you had any experience in building structures that would enable you to estimate the reasonable value and cost?

A. I have had experience on the construction of railroads.

Q. Built depots, and railroad work?

A. Yes, in building the terminal improvements at Portland on the North Bank freight houses.

Q. You know the price of materials and labor for that kind of work?

A. Yes.

Mr. DA PONTE: I want to state that the improvements are such as any squatter would come and put on the place, that is all.

Q. State what is the value in your opinion of that dwelling there?

Mr. GORDON:

Q. Ever build any dwellings in this section of the country?

A. No, sir.

Q. How long have you lived in Pierce County?

A. I have lived in Pierce County about thirty or thirty-four years.

Q. What has been your business for the last five or ten years?

A. Last 12 years, engineering.

Q. Civil engineering?

A. Yes.

Q. You never have built any dwellings?

A. Not dwellings of this nature.

Q. Never had charge of any such work?

A. Not dwellings.

42 Q. You are not a carpenter or builder and never have been?

A. No.

Q. Ever been in the real estate business in the city of Tacoma or vicinity?

A. No, sir.

Mr. GORDON: If your Honor please, I submit he has got no expert knowledge on this subject.

Mr. DA PONTE: He says he knows the value of material and labor that goes into a structure such as that; been in charge of building terminals at Portland; built depot structures and things of that kind; he does not have to build a dwelling——

The COURT: I do not think that would qualify his as an expert on dwellings.

Mr. HUFFER: I move, your Honor, to have the testimony of this witness stricken out as far as he testified to the improvements on the Concannon property.

The COURT: Objection sustained; also the former objection will be sustained, and the evidence stricken as to the values on the Concannon property.

(By Mr. DA PONTE:)

Q. Will you describe the nature of the improvements on the Classen property; any fences there?

A. Yes, sir.

Q. How much fence?

A. Why the fence encircles the entire section there, shown in green.

Q. Do you know how long that fence has been there?

A. No, I cannot tell.

Q. What appearance has it?

A. It has the appearance of,—oh, I should judge seven or eight years, maybe ten.

Q. Not over ten?

43 A. Well, it has been patched up; could not tell much about the fence.

Q. Describe those improvements; what they consisted of and the nature of them?

A. Why the dwelling there; I believe it has two stories and I think it is 24 by 30; and I do not know, I cannot testify as to its being painted; and the shed is 20 by 40, being constructed of one inch boards; it is open on three sides.

Q. What age do those houses appear to be?

A. Well, the dwelling has the appearance of being in the vicinity of ten years, and also the shed.

Q. Now the Shade and Classen encroachments lie about equally between the inner and outer 100 foot lines, roughly speaking, don't they?

A. Yes, sir.

Q. About half on one side and half on the other of the 100 foot line, approximately?

A. Yes, sir.

Q. Now was there ever any change in that center line as shown there up to the time that this double tracking was done?

A. Not to my knowledge.

Q. You say such changes as were made there was about what? What would be the center line between the two tracks now as compared with the old center line?

A. The center line between the two tracks. As stated, between 7 and 8 feet.

Q. That is as to the center line between the two present tracks?

A. Varying from one side to the other; the original location of the old center line.

Q. You think that old center line is the line of present location about as near as it is practical for engineering skill to get?

A. Yes, sir.

44 Cross-examination.

(By Mr. GORDON:)

Q. The old center line is eight or nine feet each way?

A. It varies.

Q. The present center line you think approximates the old center line?

A. It depends on what you call approximation.

Q. Is it intended to represent, —— (interrupted).

A. The center line as it exists now does not represent the center line.

Q. Which way was the old line, north or south of the present center line?

A. It varied.

Q. Here opposite the Shade place (indicating)?

A. Speaking now of the southwest corner?

Q. Talking about the center?

A. Very close to being in the center of the south track.

Q Very close to being in the center of the south track?

A. Yes.

Q. So that at a point about midway of the Shade place the center line of the main line as originally constructed would be about the center of the south track as it now exists?

A. Yes, sir.

Q. When was this plat of Van Dusens to which you referred, filed; when was that filed?

Mr. DA PONTE: I object to that; it speaks for itself.

The COURT: Objection sustained.

Mr. GORDON: If your Honor please, I do not think your Honor understands me. The witness has given his opinion as to where the center line of this railroad as originally constructed was,—the case in fact will resolve upon that. On cross examination it develops

it is not from anything that is observable physically; not
45 from any data that is incontested in the office of the company or offices of the company, but that he gets it from a certain plat. Now of course we could make the objection that that is not the best evidence, the plat wolud be the best evidence. I simply desire to know what the date of that was.

(Argument.)

The COURT: The objection to the question will be sustained. Exception allowed.

Q. Is there more than one addition?
A. I should judge there is only one addition; that described.
Q. Where did you see this map?
A. On record in the auditor's office.
Q. Did you examine it in the office of the auditor?
A. We had a copy of the original copy.
Q. Of the original copy?
A. Yes, a copy.
Q. It is based on that then. This testimony you have given as to locations is based on that as to the line as originally constructed?
A. Yes; but there are other points besides this one.
Q. You mean other sources of information?
A. Yes.
Q. What?
A. Information found in the engineering department.
Q. Records, you mean?
A. That I made.
Q. You mean records?
A. Yes, sir.
Q. From those records and this map you are giving your information?
A. Yes, sir.
Q. You have no personal information on the subject?
A. Why, I do not know what you have reference to.
46 Q. Ever see it yourself?
A. Yes, sir.
Q. Ever measure it yourself while it was there?
A. I had occasion to go fishing at this reservoir at this point and I was,—well, that was I used to go with one of the engineers that had much of that work; I used to fish in this tank right opposite the Concannon place, this point in fact,—the building there (indicating), originally built for a bridge; there had been a bridge there previous to the construction of the culvert at this point, and I know positively it never was changed.
Q. You knew the point opposite the reservoir had never been changed?
A. Yes, I know that positively.
Q. How far is that from the Shade place?
A. About fifty feet.
Q. Which way?
A. West.

Q. The line varied, and the plat showed the line varied?
A. Yes, but not at those points?

Mr. DA PONTE: What line?

A. The old original line?

Mr. GORDON:

Q. The original line?
The WITNESS: He wanted to know if there was any personal ways I had of determining the old center line.

Mr. DA PONTE:

Q. How did you determine it?
A. He aked me if I had any personal way. I knew of it years ago.
Q. What amount is on the ground from which you started to get this present location of the center line?
A. Monument set there by the Northern Pacific Railroad, the old center line.
Q. How is that identified?
A. Identified by records in the office.
47 Q. Did you find it there?
A. Yes, sir.
Q. Did you run the line from that?
A. I ran the line from the monument line.
Q. Have you any doubt but what you located the center line?

Mr. GORDON: I object to that.
The COURT: Objection sustained.

Q. How far is that monument from the center line?
A. How far from the present center line?
Q. No, the old center line?
A. On the old center line.
Q. You located that monument?
A. No. I thought you wanted to know how I got my starting line.
Q. I want to know how you found your center line?
A. Notes in the office; found the old monuments; finding the location of the monuments,—then I had the key to the old center line.
Q. Did you find them?
A. Yes, sir.

(By Mr. GORDON:)

Q. What are they?
A. Made out of concrete.
Q. Where are they, in the ground?
A. Yes.
Q. Do they extend above the surface?
A. No, they cannot on account of the ties.
Q. What distance are they apart?
A. They are at every point of curve, point of tangent, where they intersect the Van Dusen line on the east and on the west.

Q. When were they put there?

A. Put in there in nineteen,—well, I could not recall the
48 exact date; I would have to go to the records for that.

Q. As nearly as you can?

A. I cannot say that because I,——

Q. Before or after the double tracking?

A. Oh, it was after the double tracking.

Q. Still you say you got the data from the records in the office?

A. Yes, sir.

(Witness excused.)

Mr. A. F. STOTLER, being recalled, testified as follows:

(By Mr. GORDON:)

Q. Mr. Stotler, I want to ask one other question. I want to ask you one question about these concrete monuments. About how many years ago were they put in there?

A. That is something I cannot say; I judge about in the neighborhood of 1900 or later.

Q. That is, they were put in there during the last ten years, approximately that close?

A. Yes.

(Witness excused.)

Plaintiff rests.

49 *Defendants' Motion.*

Mr. GORDON: For the purpose of the record, I desire to move to strike the testimony of this witness, all the testimony based upon matters that are of record either in the shape of plats or date in the office of the company, everything except physical monuments or things that are on the ground subject to observation, as the railroad company's own personal information, matters that are of record, and data in the office of the engineers are all matters that can be produced here, and are the best evidence, and upon that ground I move to strike such as is not the best evidence.

Mr. HUFFER: The defendant Concannon joins in the objection.

The COURT: The objection may be considered as made by all the defendants and overruled.

Exception allowed to all the defendants.

And thereupon, to maintain the issues upon their part, the defendants introduced the following testimony, to-wit:

50 *Defendants' Testimony on Behalf of Defendant- Concannon et ux.*

Mr. L. A. NICHOLSON, a witness called on behalf of the defendants, being duly sworn, testified as follows:

Direct examination.

(By Mr. HUFFER:)

Q. What is your name?
A. L. A. Nicholson.
Q. What is your business?
A. Civil engineer.
Q. You have been a civil engineer how long?
A. Been in the business about 20 years.
Q. And practiced here in Tacoma how long?
A. Most of that time in Tacoma.
Q. I will ask you whether you have caused a survey to be made of the land described in plaintiff's amended complaint,—you have read that have you, and made a survey of it?
A. I have.
Q. I call your attention to this blue print, defendant Concannon's Identification One. (Handing blue print to witness.) Does that represent the result of the survey that you made?
A. It does.
Q. What is represented by the land enclosed in the red line, the broad red line?
A. The broad red line shows the description of the property in controversy, according to the amended complaint.
Q. The property described in the amended complaint? This has been eliminated from the controversy (indicating; refer to the property described in the amended complaint as being included,—What does this irregular line that is immediately south of the track described in the complaint, and which is enclosed in the red
51 line, represent?
A. It represents a fence; a portion of the double line represents a cribbing.
Q. What does the dotted line represent which is immediately south of the irregular line which represents the fence and the cribbing?
A. It represents, and is so designated, as the line 100 feet from the center of the Northern Pacific right-of-way.
Q. And this structure marked "A" represents what?
A. Represents the dwelling house of defendant Concannon.
Q. "C," what does that represent?
A. "C" represents a barn and "D" represents another barn, and "E" represents a shed.

Mr. HUFFER: I offer this blue print in evidence in connection with the testimony of Mr. Nicholson.
The COURT: It may be admitted in evidence.

Whereupon said blue print is received in evidence and marked as Defendants' Exhibit One.

Mr. HUFFER: On behalf of defendant Concannon and all the defendants that wish to join in it, I wish to offer in evidence this final receipt.

Whereupon said receipt is received in evidence, without objection, and marked as Defendants' Exhibit Two.

Cross-examination.

(By Mr. DA PONTE:)

Q. Mr. Nicholson, in locating this 100 foot line from the center of the right of way, how did you get the center line?

A. I took the center line from one point in the line of the right of way, the 200 foot line; took the description as given in the amended complaint.

Q. Never mind about that; I want to know how you located the center line?

52 A. The center line I have found is an indefinite quantity; it does not follow the present location of the tracks.

Q. It has been changed then?

A. Been a change in the track.

Q. You simple took the center line of those two tracks didn't you?

A. Not necessarily.

Q. Didn't you?

A. Not necessarily. I had other notes there and tried to make it conform to the notes.

Q. Doesn't this one hundred foot line that you have marked here purport to be one hundred feet from the center line of these two present located tracks?

A. No, I don't think it is.

Q. Do you know?

A. I know that the center line of the right of way is between the north track or northerly track.

Q. You agree with Mr. Stotler on that?

A. I mean the center of the north track, that is shown.

Q. Do you know how it is along in front of Concannon's and Shade's?

A. I know it was further west. When I entered into this matter that was the location here (indicating); I found the matter did not agree with what other notes I could find on it. I applied to the Northern Pacific for some notes on that and they said the location had been changed. I knew a change had been made in the location of the track and it being the center of the right of way——

Q. The center line was not between the tracks?

A. I knew that to be a fact, yes.

Q. Do you know about what the difference would be?

A. As near as I could make it, it would be eight or ten feet.

Q. In other words the present center line of the two tracks is not to exceed 8 to 10 feet to the north of the old center line of

53 the right of way as granted by Congress,—the original center line?

A. The center line you say is north?

Q. South of the present track. South of the center of the two present tracks.

A. I do not make it so. It seemed to me the old center line was north.

Q. Yes, that is right. In other words, as the track is now built Concannon's lands would be a little further north of the old line than it is of the center line of the two new tracks, wouldn't it?

A. The Concannon land would be further north?

Q. Yes, the Concannon land would be further north of the old line than it would of the present two tracks here, if that was south, the old center line was south?

A. I said the old center line appeared to be north.

Q. That would carry the one hundred foot strip then further north?

A. Yes.

Q. But Concannon is in the right of way, as described here, whichever line you take?

A. Yes.

Q. Take the Shade property here,——

Mr. GORDON: If your Honor please, I object to the question. We did not put this witness on. He has made his case against Mr. Shade.

The COURT: I will sustain the objection. This is the defendants' case now.

(Witness excused.)

54 Mr. SAMUEL GIRARD, a witness called on behalf of the defendants, being duly sworn, testified as follows:

Direct examination.

(By Mr. HUFFER:)

Q. What is your full name, Mr. Girard?

A. Samuel Girard.

Q. Where do you reside, Mr. Girard?

A. South Yakima Avenue.

Q. In the city of Tacoma?

A. Yes, sir.

Q. How long have you lived here?

A. Twenty-two years, I believe.

Q. Are you acquainted with the property in controversy here between the Northern Pacific and Mr. Concannon's?

A. Yes, sir.

Q. This property, which is the property in controversy, is the property to the east of the center line here of Boundary street. I will ask you, Mr. Girard, when you first became acquainted with the property, or first learned about it?

A. 1892 is the date.

Q. But before that time, before 1892, who, if anybody, was in possession of it?

A. A man named Smith.

Q. When did you first learn that Mr. Smith was in possession?

A. I am not positively sure; I think it must have been about 1900.

Q. You mean 1900?

A. Yes, 1899 or 1900.

Q. You mean 1889 or 1890?

A. 1890, yes, sir; 1889 or 1890.

Q. At that time in 1889 was Mr. Smith living upon the property?

A. Yes, sir.

55 Q. Who was living with him?

A. His mother.

Q. Referring to this map, Exhibit "A" of plaintiffs, will you kindly indicate where Mr. Smith was living at that time, in 1889?

A. Living right in here (indicating).

Q. That is represented by the square to the south and left of the dwelling and the south and east of the big barn, Boundary Street?

A. Yes.

—. The small square here — of Boundary Street?

A. Yes, between J and K, between here (indicating); the house was here; I believe this was an alley; the house was a little bit east of this.

Q. Mark on the map the place where the house was in which Smith lived in 1889?

A. I should judge this was the house, (indicating), the little square, some place in here.

Q. That is to the south and left of the place marked dwelling there, the Concannon dwelling, to the south and to the west of it; that little square, was that it?

A. Yes, I think that is about where the house was; a new house here near the east line of this alley and this Boundary street, laid right in here somewhere, about the location as near as I can tell (indicating on plat).

Q. Were you ever in possession of that property?

A. Yes, sir.

Q. From whom did you get your possession?

A. I got it from Bert Smith and his mother.

Q. And what was the transaction between you and Smith?

Mr. DA PONTE: I will object to that, if your Honor please, he cannot prove acquisition of real estate in such a way as that.

The COURT: Objection overruled.

56 Mr. DA PONTE: Note an exception.

Q. Tell what was the transaction between you and Mr. Smith?

A. I bought it from Mr. Smith.

Mr. DA PONTE: I object, your Honor, it is not the best evidence. (Argument between counsel. No ruling by the court.)

Q. Did Mr. Smith give you a deed to the property?

A. Yes, sir.

Q. And you paid for it?
A. Yes.
Q. What was the date of that deed?

Mr. DA PONTE: Same objection; there is no testimony to account for the loss of the original.
The COURT: Objection overruled. Exception allowed.

A. That deed was '92.
Q. What date?
A. 1892, I think the latter part of April or first of May, 1892.
Q. What did you do with that deed?
A. I got from Mr. Smith?
Q. Yes?
A. Gave that to Mr. Concannon, sold to Concannon.

Mr. DA PONTE: I move to exclude all the testimony, your Honor, since the deed has been traced into the possession of the defendant.
Mr. HUFFER: We will show by the defendants' testimony that the deed has been searched for by them, and is lost.
The COURT: Objection overruled; exception allowed.

Q. When Mr. Smith sold you the property did he point out the boundaries of the property?
A. Yes, sir.
Q. Where did he claim to own, how much?
A. Claimed to own from J street to K street, and from the
57 property line on the north to within a hundred feet of the railroad, of the railway track on the south.

Mr. DA PONTE: Same objection.
The COURT: Objection overruled.

Q. The property on the north,—you mean Van Dusen's Addition and Smith & Root's Addition?
A. Yes.
Q. So that all the land between J street and K street, and Van Dusen's and Smith and Root's Addition to the 100 foot limit of the right of way,—that is 100 feet from the track?
A. Yes, sir.
Q. When Mr. Smith showed you that property did he show you the boundaries where it went?
A. Yes, sir.
Q. Was Mr. Smith in possession at the time you bought it?
A. Yes, sir.
Q. And immediately after you bought it did you go into possession?
A. Yes, sir.
Q. When you bought the property what improvements were there upon it?
A. There was a house and a dwelling house and a poultry house.
Q. Dwelling house and poultry house; where was the dwelling, which one of the squares, which of the marks there represents the dwelling that was occupied by Mr. Smith?

A. The poultry house was located a little bit west of the dwelling house, near the spring, just above the spring.

Q. Where is the spring located?

A. The spring was located west and south of the house, perhaps about 40 feet, 30 to 40 feet, maybe 50 feet.

Q. I call your attention also, Mr. Girard, to defendant Concannon's Exhibit One. Take that and show on that map where
58 the spring you refer to is located?

A. Well, I think that is about as near correct as could be,—it is the spring where it is marked.

Q. The spring marked with a cross and the word "spring" over it?

A. I would think that is about where it was located, about straight from this line here.

Q. And the house that was made by Mr. Smith is above and a little to the right, north and a little to the east of the spring?

A. Yes.

Q. Is that the house there marked "C"?

A. Yes; that is about the location of the house.

Q. When you got the deed from Mr. Smith did you check up the description in the deed with the land on the ground and see that the land was described in the deed?

A. No, the deed was not made out there. I visited the land before the deed was made out. The deed described the land.

Q. Did Mr. Smith claim to own the property at the time he sold it to you?

A. Yes, sir.

Mr. DA PONTE: I object to that as hearsay; irrelevant, immaterial and incompetent.

The COURT: Objection will be overruled.

Q. Did Mr. Smith claim to own the property?

A. Yes, sir.

Q. Did he state how long he had been in possession?

Mr. DA PONTE: I object to that; that is no part of the claim to the possession of title how long he had been in possession.

The COURT: Objection sustained.

Mr. HUFFER: Exception.

The COURT: Exception allowed.

Mr. HUFFER: I offer to show, your Honor, by this witness,
59 that Bert Smith as grantor claimed to have been in possession for seven years and no one had ever molested him.

The COURT: I think it would be better to let the record show the objection made and overruled, and let the record show that.

(By Mr. HUFFER:)

Q. How long did you say he has been in possession?

A. Smith? About seven years I think he said.

Q. What did he say about anyone questioning his right to be there or molesting him?

Mr. DA PONTE: I object to that question as hearsay.

The COURT: Objection overruled.

Mr. DA PONTE: Exception.
The COURT: Exception allowed.
Q. What did he say about anyone questioning his right; did he say anything about anyone questioning his right to be there?
A. No sir.
Q. Said he had or had not?
A. Said he had not been bothered.
Q. When you bought the property from Mr. Smith did you believe you then owned it?
A. Yes, sir.

Mr. DA PONTE: I object to that.
The COURT: Objection sustained.

Q. After you bought the property from Mr. Smith did you claim to own it to all the world?

Mr. DA PONTE: I object to that. Do not answer Mr. Witness.
The COURT: Objection sustained.
Mr. HUFFER: I do not like to discuss the question after the court has ruled; one of the essential elements in adverse possession is the claim—(interrupted).
Mr. DA PONTE: By what he did, not by what he thought.
Mr. HUFFER: Exception.
60 The COURT: Exception allowed.

Q. After you bought the property and entered into possession, what if anything did you do toward improving it?
A. I built a fence around it and built a poultry house there.
Q. Will you kindly indicate here on Defendant Concannon's Exhibit Number One where the fence that you referred to was built by you?
A. Well that is the fence I built (indicating); only I built a fence up here that don't show.
Q. What was the extreme end of the fence in the direction of K street; can you indicate there about where the end of the fence was nearest to K street?
A. Do not think it came out quite to the sidewalk.
Q. You mean quite to the sidewalk on K street?
A. No, I do not think it did.
Q. Did it come near to the sidewalk on K street?
A. Yes, within a few feet.
Q. Will you indicate there just about where the end of the south fence came?
A. Yes; came about there (indicating).
Q. Mark that with "1" in a circle, in pencil.

(Witness does so.)

Q. And where did the north end of that fence come then; did it go straight north and south, practically?
A. Why it went up to this property line, leaving a roadway.
Q. Went up to this property line?
A. Yes, just leaving a roadway; you see this street was graded down to here and the side walk projected out there. There was

one vacant lot just room for a roadway, for a team to pass through there.

Q. A roadway through there?

A. Yes.

61 Q. With that exception it went up to about what point? Mark on the map—up to the property line?

A. It did not go up there; just a roadway through there.

Q. The roadway then was between the end of your fence and the property line on the north; that was the idea?

A. Yes.

Q. Mark that by "two" in a circle.

(Witness does so.)

Q. Was that between the point marked two in the circle there and the right of way was the roadway?

A. Yes, sir.

Q. Now from the point marked two in the circle, where did the fence run?

A. Ran from here to J street.

Q. Along what line; indicate along what line it ran with reference to that broad red line?

A. It ran about, say maybe 11 or 12 feet from this property line, just left a roadway there through the front of my house.

Q. Passing over here to the west side of J street, where did the fence run west from there?

A. West?

Q. This is the Concannon house; this is the shed (indicating).

A. About the same distance south of this property line here that it was from here; I think about 11 feet.

Q. About how wide is that roadway?

A. Really I don't know; only could guess at it. I should judge about 10 or 12 feet; it is narrow.

Q. Now, did that fence run along parallel with this red line?

A. With the property line, if that is what that is.

Q. That is the description of the Concannon property?

A. Yes, sir.

62 Q. Where did the fence go with reference to that red line?

Mr. Da Ponte: He has stated that about four times.

A. Came out to J street and about 11 feet south of this property line.

Q. About 11 feet south of which property line?

A. This row of houses, from the Van Dusen addition; you see there was seven houses there and there was a fence on the last house, and was an alley-way between that fence and the fence I built; about 11 or 12 feet.

Q. Did this fence extend continuously from the west side of J street to the point marked two in the circle?

A. Yes, sir.

Q. When did you build that fence?

A. Bought in April 1892.
Q. When did you build the fence?
A. Built it shortly after I got the place; shortly after I moved there.
Q. About how many months?
A. Well, I do not know about that.
Q. Speaking safely, within how many months after you went into possession did you build that fence?
A. At the outside—I do not remember; I know I built it right away.
Q. Within six months?
A. Yes, I think so, because the first thing I done was to build the fence.
Q. What other improvements did you make at that time, if any?
A. Built the poultry house.
Q. Where was the poultry house built?
A. That poultry house was in here (indicating).
Q. On which side?
A. The poultry house was built on the north side.
Q. This is the west side (indicating).
A. West side of Boundary street, yes; the property came
63 out in here, down this way.
Q. How long did you remain in possession of the property?
A. I was there five or six years.
Q. When did you vacate?
A. I vacated—I think it must have been about '98.
Q. What month in '98?
A. It was November—December.
Q. At that time did you sell out to anyone?
A. Yes, sir.
Q. To whom?
A. Mr. Concannon.
Q. Up to the time you sold to Concannon, were you continuously in possession of the property?
A. Yes, sir.
Q. Did anyone ever object to your being on the property, making improvements on it?

Mr. DA PONTE: I object to that.
The COURT: Objection overruled; exception allowed.

Q. Did anyone ever object to your being on the property or making improvements on it?
A. No, sir.
Q. Now Center street, which is shown here on this map, Plaintiff's Exhibit "A", was that a well-traveled street in 1892?
A. Yes, sir.
Q. And did it remain a well traveled street up to the time you sold to Mr. Concannon?
A. Yes, sir.
Q. Now Boundary street which is represented here on the map,

was that open so that wagons and teams could go down through it and people pass over it?

A. It was open, but was not graded.

64 Q. But were teams travelling over it, and people walking over it

A. Yes.

Q. J street, was that open also from Center street down to your property, the property you had possession of, the present Concannon property?

A. Just the same as the alley was open, but it was not graded.

Q. But teams traveled back and forth upon it?

A. Yes, sir.

Q. K street, was that open at the time from Center Street down to the Concannon property?

A. Yes, K street was graded.

Q. Traffic on that; teams and wagons passing over it?

A. Yes.

Q. And the improvements which you made upon the property, the fences, and so forth, could they be seen readily by anyone traveling on J street or K street or Boundary street?

A. Well if they got down near that end of the street they could see them plain.

Q. Were you continuously in possession from the time you bought from Smith until you sold to Concannon?

A. Yes, sir.

Q. When you sold to Concannon you turned over possession to him at once?

A. Yes, sir.

Mr. DA PONTE: I object to counsel leading the witness.

Q. Were you a married man, Mr. Girard, at the time you resided there?

A. Yes, I was a married man.

Q. What was the general reputation and belief in the community there as to the width of the Northern Pacific Railway Company's right of way?

Mr. DA PONTE: I object to that.

65 The COURT: Objection sustained.

Mr. HUFFER: Exception.

The COURT: Exception allowed.

Q. What was your belief, Mr. Girard, as to the width of the company's right of way?

Mr. DA PONTE: I object to that.

The COURT: Objection sustained.

Mr. HUFFER: Exception.

The COURT: Exception allowed.

Mr. HUFFER: I offer to show by this witness it is the general repute in that vicinity that the company's right of way was only 100 feet on each side of the center line and that this witness believed that

it was only 100 feet wide, for the purpose of showing the claim was bona fide.

The COURT: I will hear you on it if you want to be heard.

Mr. HUFFER: It is a circumstance, your Honor, bearing on the question of the bona fides of making the claim of title; that if he thought that the railway company's right of way there was only 100 feet wide, then he was justified in believing that they had no interest in the land that he was upon that was off the 100 foot strip. As far as the railroad company was concerned he was acting in perfect good faith in claiming as against the railroad company at least.

The COURT: The ruling will stand.

(By Mr. HUFFER:)

Q. Before you sold the property to Mr. Concannon, did you or did you not show him the boundaries of the property that you claimed to own there?

A. Why, I suppose I did; it was fenced in; I guess I did. I don't remember of doing that but I naturally suppose I did.

Q. Did you give Mr. Concannon a deed to the property?

A. Yes, sir, gave him what I got from Smith.

Mr. DA PONTE:

Q. What did you say?

66 A. I gave him what I got from Smith.

(By Mr. HUFFER:)

Q. Did you execute a deed of your own to Mr. Concannon, sign a deed, to Mr. Concannon, to the property?

A. Yes, sir.

Q. Did your wife join in the deed?

Mr. DA PONTE: Same objection to that instrument your Honor as to the other instrument.

Mr. HUFFER: We will show it was lost.

The COURT: Objection overruled.

Q. Was the fence that you had put around the property after you went into possession; was that still in place at the time you sold the property to Concannon and turned the possession over to him?

A. Yes.

Cross-examination.

(By Mr. DA PONTE:)

Q. Mr. Girard, you say that there was a road, a public road, between your fence and this property line along there?

A. Yes.

Q. And that your fence was about 12 feet from the property line?

A. Yes, sir.

Q. You never had any possession of that which was used as a public road out there,—your line went to the road didn't it?

A. I think I did use that end of it awhile.

Q. But this was used by the public as a road, you did not fence it up?
A. Yes, sir.
Q. Did you have any fence on this end?
A. Yes, sir.
Q. Have a fence on the south?
A. Yes, sir.

67 Mr. HUFFER:

Q. (Indicating.) This end you mean, the east end?
A. Yes, sir.

(By Mr. DA PONTE:)

Q. Who did Smith get that land from, Bert Smith?
A. He told me; I forgot.
Q. He did not give you any abstract of title did he?
A. No.
Q. You simply found him in possession living there?
A. Yes, living there.
Q. Did you go to the railroad company to find out who owned the land?
A. No.
Q. Smith had no deed, had he?
A. He made out a deed.
Q. He had none?
A. I do not know.
Q. You made no inquiry as to that?
A. I made no inquiry as to that.
Q. Don't you know that title to real property is by written instrument?
A. Yes, I know that.
Q. You knew when you went there that Smith had no right to that land?
A. I did not know.
Q. You did not know that?
A. I thought he had the same right he gave me.
Q. What right was that?
A. Gave me a deed.
Q. Did you examine the records to see whether he had a deed or not?
A. No.
Q. Isn't it a fact that you found Smith in possession and he proposed to sell to you and you took a deed,—you made no inquiry as to Smith's title, did you?
A. Yes, I did.
Q. Who did you inquire of?

68 A. I inquired of different parties around the neighborhood.
Q. What did you find?
A. Found out that he had lived there a number of years.
Q. And that was all?
A. That he lived there a number of years before.
Q. You found that he had no paper title, didn't you?

A. I don't think he had any title, as far as that is concerned.
Q. He had no title,——

Mr. HUFFER: Let him finish the question.

Q. What did you pay Smith?
A. Fifty-five dollars.
Q. Fifty-five dollars for the whole place?
A. Yes.
Q. Did you pay cash?
A. Yes, sir.
Q. You never paid any taxes on that land?
A. No, sir.
Q. Not a cent?
A. No.
Q. You never paid any taxes on it at all?
A. No.
Q. Why didn't you pay taxes if it was your land?
A. Wouldn't accept taxes.
Q. They told you it was Northern Pacific land didn't they?
A. No, they told me to get,—they wanted certain specifications in regard to the location of the property; they wanted some kind of definite information in regard to the bounds of the property that I could not give them without an abstract.
Q. No abstract to be had, no instrument of record affecting the title to this day, are there?
A. Well, yes; I tried to get an abstract.
Q. Well, why didn't you get it?
69 A. They told me that,—they informed me at the abstract company's office that the property had passed through about 150 different hands and transfers and it would cost me an immense lot of money as it was very difficult to get an abstract.
Q. Don't you know there isn't a single instrument of record affecting the title to this land?
A. No, I don't know anything about it.
Q. Don't know anything about that?
A. No.
Q. In fact you never did know anything about the title to this land, did you?
A. All I know is what the abstract man told me in the office.
Q. Are you in the habit of buying land that way; if you find a man living on a piece of land you go and buy it, do you?
A. No, sir, I do not.
Q. Why did you buy this that way?
A. I never had any dealing in land up to that time.
Q. You would not do such a thing now would you?
A. No.
Q. Could you read at that time?
A. Read?
Q. Yes?
A. Yes, sir.
Q. How was that deed writtem typewriting, or what, that Smith gave you?

A. That was in penmanship.
Q. Who got it up?
A. I do not know the man's name.
Q. Did Smith write it?
A. No.
Q. Did a lawyer write it?
70 A. I think a lawyer, yes.
Q. Who was he?
A. I do not know his name.
Q. Do you know how the land was described in the deed?
A. Yes.
Q. How was it described?
A. Described as the land between J and K street all laying between root and Van Dusen Addition and within 100 feet of the Northern Pacific track.
Q. Within 100 feet?
A. Within 100 feet, yes.
Q. That was the only way it was described?
A. Yes, sir.
Q. Between J and K street-, and between what and the right of way?
A. Between the Van Dusens Addition and the Root Addition and the Northern Pacific right of way line.
Q. Right of way line?
A. Yes.
Q. You do not know what line that referred to, do you?
A. That referred to 100 feet.
Q. How do you know it did?
A. That was specified.
Q. Did you survey there to see where the 100 foot line was?
A. No, never surveyed.
Q. Never put your fence on the 100 foot line at all, did you?
A. No, I did not care to; I ran it down to take in the spring; I was afraid maybe I would get over the line with the spring but that is as far as I went.
Q. Was that deed acknowledged by Smith and his wife?
A. He did not have any wife.
Q. By Smith?
A. Acknowledged by Smith and his mother, I guess.
71 Q. You guess. Do you know whether it was?
A. You mean made of record in the court?
Q. Acknowledged before a Notary Public?
A. I do not believe it was; do not think so.
Q. Just simply signed?
A. Yes.
Q. Why didn't you record the deed?
A. Didn't know anything about deeds, or about dealing in property; that was the first transaction I ever made in my life.
Q. How old were you?
A. Old enough to know better. I am 45 now. You can figure it out.

Q. You know now, since you have had more knowledge and experience, that Smith was merely a squatter on the land?

Mr. HUFFER: That is objected to as incompetent, irrelevant and immaterial,

The COURT: Objection sustained. That might be sustained on the ground that it calls for a conclusion of the witness.

Q. You know what a squatter is on land? A man who finds a pi-ce of land vacant and squats on it, without any claim to the land. You know what a squatter is, don't you?

A. I know what I understand to be a squatter.

Q. What?

A. I understand, that nobody else has got a title to it better than he has got.

Q. That was what Smith was?

A. I don't know.

Q. Don't you know that Smith was merely a squatter on the land?

Mr. HUFFER: That is objected to.

A. I don't know.

Q. You gave Concannon a deed?

A. Yes, sir.

Q. How was your deed acknowledged, before what notary public?

72 A. I cannot tell you; I don't know whether it was, I do not think it was.

Q. Your deed was not acknowledged?

A. I do not think it was.

Q. Did you come down before some Notary Public downtown, before some officer, and put your seal on it, your signature?

A. I don't think so; my wife was in Oregon.

Q. You signed it?

A. Yes, I signed it.

Q. You did not acknowledge it before a notary public?

A. I do not know about that.

Q. If you had come downtown to acknowledge it, you would remember it wouldn't you?

A. I do not think we did, or I would have remembered it.

Q. Do you know who got the deed up, who prepared it?

A. Why I just turned over the deed I had from Smith. I and my wife.

Q. Didn't give him any deed at all?

A. No, I don't think so.

Q. Just handed him your other deed, the Smith deed?

A. Yes, sir.

Q. That is the way you remember it?

A. Yes.

Q. And that is the only deed that Concannon got from you isn't it?

A. Yes.

Q. Just the one deed?
A. Yes. The only deed he got at that time.
Q. Do you know of any other time he got a deed; do you know of his getting any other deed from anybody?
A. I know of him getting a paper; I do not know whether
73 it was a deed or not.
Q. Getting a paper from who?
A. From I and my wife; we made him out a paper, I do not know what it was now.
Q. What kind of a paper?
A. Don't remember that.
Q. Was it a bill of sale of that house out there?
A. I do not remember; really I do not. I remember I and my wife making out some papers and giving to Mr. Concannon.
Q. You know what a deed is, don't you?
A Yes, sir.
Q. You know a deed has to be signed and acknowledged to pass a title, don't you?
A. Yes.
Q. The railroad company was not using that land or having any use for it at that time, was it,—at the time you occupied it?
A. Nobody used, it, only me.

(Witness excused.)

74 Mr. P. J. CONCANNON, One of the defendants herein, being called as a witness and duly sworn, testified as follows:

Direct examination.

(By Mr. HUFFER:)

Q. Your full name, Mr. Concannon?
A. P. J. Concannon.
Q. You are the P. J. Concannon named as a defendant in this case?
A. Yes, sir.
Q. And you live in the city of Tacoma?
A. Yes, sir.
Q. How long have you lived here, Mr. Concannon?
A. About 20 years.
Q. You are now in possession of the property here in controversy?
A. Yes.
Q. When did you get possession of the property?
A. I think November 1898, either November or December.
Q. Did you buy it?
A. Yes, sir.
Q. From whom?
A. Mr. Girard.
Q. Was he in possession at the time?
A. Yes, sir.
Q. Did Mr. Girard claim to own the property?
A. Yes, sir.

Mr. DA PONTE: I object as to what Mr. Girard claimed.
The COURT: Objection overruled.

Q. What improvements were there upon the property at the time Mr. Concannon. In connection with your answer I wish you would refer to defendants' Exhibit one. Indicate to the court the fences and other improvements on the property at the time you bought it in November or December 1898?

A. There was a small house.

75 Q. Please state where the fences were?

A. Why there was fences around about where this red line was, except you would run it here further and run it there further (indicating on Exhibit 1).

Q. What do you mean by that?

A. Towards J. street.

Q. Further towards J than the red line?

A. Yes.

Q. And also further towards K street.

A. Yes.

Q. And how far south was the fence located?

A. Why the strip outside of this red line; there is the cribbing there, now, just inside of where the fence was at the time I bought the place; a cribbing right along there, a fence right outside of there (indicating), a fence is still there.

Q. Now the fence which was south of the land that is outlined on this map, is that shown by these double lines marked cribbing and the single dotted lines marked "fence"?

A. Yes, right down there it is shown. (Indicating.)

Q. Where was the fence off in the north?

A. The fence running from K street right through past what they call Boundary avenue, where that little house is there now,—when I built that little house I tore down the fence.

Q. You have changed it?

A. I have made a barn yard here (indicating). That fence ran up there and then up to G street.

Q. What do you mean by that? (Indicating).

A. Northwest corner of block nine of Van Dusen's Addition, or approximately there. That is block nine (indicating), and the fence ran along there and out here.

Q. Straight out along the south line of block nine?

76 A. Yes.

Q. That building marked B was put up afterwards?

A. After I bought the place, the building B and C. This barn there, "D" I think it was, that was put up afterwards and this cribbing was put up and this cribbing here (indicating). The fence outside the cribbing was there at the time I bought the place.

Q. The fence that was on the north of the land, did that enclose or was that north of all of the land that is outlined here in red?

A. Yes, it was.

Q. And that extended from K street to J street?

A. Yes.

Q. Was the property completely enclosed with the fence?

A. It was.
Q. So what houses were there upon the property at the time you bought?
A. A little house right there, and there was a small chicken house along here (indicating).
Q. The little house marked "C"?
A. Yes, sir.
Q. Where were the chicken houses?
A. Just below Boundary avenue; just west of Boundary avenue.
Q. They were over on the property not in controversy?
A. Yes.
Q. What are those double lines leading from the house marked "A"?
A. Cement sidewalk.
Q. Before you bought the property, did Mr. Girard show you the improvements and the lines of the fences, the lines of his property?
A. Yes, sir.
77 Q. And did you or did you not get a deed from Mr. Girard?
A. I did.
Q. One executed by him?
A. Yes.
Q. Executed by his wife also?
A. Yes, by his wife also.

Mr. DA PONTE: I object to his leading questions.
The COURT: Objection sustained.

Q. By whom else was it signed beside Mr. Girard?
A. His wife.
Q. Did you compare the descriptions with the boundaries of the property, and satisfy yourself at the time as to whether it described the property?
A. It described the property that I bought.
Q. And what was the description of the property?
A. Why the description of the property between J street and K street and the property lying outside of the 200 foot right of way of the Northern Pacific and adjoining the Smith & Root and Van Dusen's Addition.
Q. On the north what was it?
A. The Van Dusens and the Smith & Root Addition.
Q. And what on the south?
A. The Northern Pacific right of way.
Q. What line of the right of way?
A. The line of the 200 foot limit, 100 feet on each side of the track.
Q. Was the line on the south a line 100 feet from the center of their track or 200 feet from the center of their track?
A. One hundred feet.
Q. Was Mr. Smith in possession at the time you bought
78 from him all of this property?
A. I bought of Mr. Girard.

Q. Was Mr. Girard in possession?
A. Yes, he was in possession.
Q. When you bought did you go into possession?
A. I did.
Q. Did he give you anything else besides the deed executed by himself and wife?
A. He turned over a deed to me that he got of a man by the name of Mr. Bert Smith.
Q. Where are those deeds?
A. I do not know.
Q. Have you made a search for them?
A. I have.
Q. Have you made a search in every place where you are likely to find them?
A. I have.
Q. Have you succeeded in finding them?
A. I have not been able to find them.
Q. Do you consider them lost?

Mr. DA PONTE: I object to that.
The COURT: Objetion overruled.

Q. Do you consider the deeds lost?
A. I consider them lost.
Q. Now after you took possession of the property did you make any improvements upon it?
A. Yes, I did.
Q. What improvements?
A. I built a house.
Q. Referring again to defendant Concannon's Exhibit 1, where was that located?
79 A. I believe a six room house marked "A" on there.
Q. What are those two parallel lines?
A. A cement sidewalk running out from J street to the house.
Q. Did you build that also?
A. Yes, sir.
Q. What other improvements?
A. I built a barn, that is right there (indicating).
Q. That is the structure marked "D" is it, on the map?
A. Yes, sir; barn and shed down in there.
Q. That is the west end of the property not in controversy, marked in red?
A. Yes, sir. Another blacksmith shop and barn right in there.
Q. That is the property marked "F"?
A. Put up a heavy cribbing along there, the edge of the gulch, it was very steep, from 30 to 40, and put up a cribbing and filled in back of it—got permission from the city, so as to make a roadway to this property. I did this free for the city to get dirt. I also put up a cribbing there of about 130 or 140 feet and another fill in back of there.
Q. That is west of J street is it?
A. Yes.

Q. From about the middle of J street on down past the end of the house?

A. The house marked "A"?

Q. South of the west end of the house marked "A"?

A. Yes, sir. I filled in down here; this was a gulch right in front of the house. The corner next to the Van Dusen line there was solid ground, but this was all a fill on the outside here. This was just on the side of the gulch there. I made this ground across here (indicating).

Q. That is south of the house marked "A"?

80 A. Yes, sir. Where this cement sidewalk is is a fill of probably 25 or 30 feet.

Q. How long did that property remain completely enclosed with fences?

A. For a number of years.

Q. I will put it in another way. Is there any part of that enclosure which existed at the time you bought the property which is not now enclosed, where the fence has been removed. Any part of it where the fence has been removed?

A. Yes, both on the J and K street ends, not a stick or anything now. We did not keep up the fence along here where I put up the cribbing, it of course was not necessary to keep up the fence.

Q. Why was it not necessary to keep up the fence down there?

A. The cribbing took the place of the fence, the cribbing was put on the inside of the fence, could not anything go there anyway on account of the cribbing. The cribbing took the place of a fence, the fence is outside of there the cribbing is.

Q. How high is that cribbing?

A. Part of it, along near J street there, I should judge 18 or 20 feet, here probably 10 or 12 feet (indicating).

Q. That is on the property not in controversy it is that high?

A. Yes.

Q. When were the boards of the fence removed, that you say were removed; how long ago was that done?

A. Three or four years ago.

Q. So on the first of January 1904 was that property completely enclosed with a fence?

A. Oh, yes.

Q. When did you say you bought that property, Mr. Concannon?

A. Either November or December 1908.

81 Q. 1908 or 1898?

A. I mean 1898.

Q. What claim, if any, have you made to the land since you bought it?

Mr. DA PONTE: I object to that.

The COURT: Objection overruled.

A. Why the land was mine, I own it and improved it. It is mine and I still own it and claim it; mine against anybody that comes along there.

Q. Did you make that claim shortly after you bought it from Mr. Girard?

A. Yes, sir.

Q. Since going into possession under Mr. Girard's conveyance have you been continuously in possession?

A. I have.

Q. Has anyone claimed against you, claimed the right to it?

A. About a year and one-half ago the Northern Pacific served a notice which I turned over to you and Mr. Chester.

Q. Was that the first time any adverse claim was ever made to it ?

A. Yes, sir.

Q. Just before the commencement of this suit?

A. Yes, sir; I turned the papers over to you or Mr. Chester.

Q. Did anyone object to your making any of those improvements there?

A. No, sir.

Q. Would you have made the improvements that you did make had you not believed you were the owner of the property?

A. I would not.

Q. Now can this house of yours, the structures of yours, be seen from the Center street side, different points on Center street?

A. Yes.

Q. That is a well traveled street and was at all the times
82 you were in possession?

A. Yes.

Q. And what about the improvements that were situated over the bluff, the fence and so forth, can they be seen readily from the Northern Pacific Railroad tracks?

A. Yes, and also from K street. K street has been an improved street right along.

Q. Have you had any experience in building, building houses and knowing the value of houses, Mr. Concannon, and building barns?

A. I have the last few years.

Q. Are you acquainted, you think, with the value of that kind of property?

A. Yes, I am.

Q. Are you acquainted with the value of the improvements that are upon the land here in controversy?

A. Yes.

Q. Take the cost of this structure marked dwelling; what is the value apart from the land?

A. Worth eight or nine hundred dollars.

Q. How much did it cost to build this sidewalk that is built there?

A. Probably thirty-five dollars.

Mr. DA PONTE: I fail to see the relevancy of this testimony.

Mr. HUFFER: I want to show substantially the nature of the improvements that are made; the improvements are of such a character as to indicate that the man who made the improvements made them of such a character that anyone looking at the property would say

that the man in possession of that was claiming to be the owner of it.

The COURT: Objection overruled.

Q. How many rooms are there in that dwelling?
A. Six.

Q. That sidewalk that leads from the dwelling is what
83 & 84 kind of a sidewalk?

A. Cement sidewalk, the dwelling is connected up with a sewer and water closets.

Q. Now the house that we have just referred to, is that the house that is marked "A" on this blue print, Exhibit Number one?
A. Yes, that is the one marked "A".
Q. What is the value of the barn, marked "C", apart from the land?
A. About I should say in the neighborhood of one hundred dollars.
Q. What is the value of the shed marked "B"?
A. About seventy-five or one hundred dollars.
Q. Of the barn marked "D"?
A. About three hundred dollars.
Q. And what was the cost of the cribbing and the fencing there?
A. The cribbing and fencing about five hundred dollars.
Q. You refer to that part of it, just the cribbing and fencing which is south of the land in controversy?
A. This part right in here, from J to the center of Boundary Avenue.
Q. Or the west boundary of the northeast quarter of the southeast quarter?
A. A big filling in there about 20 feet deep, 40 feet wide (indicating on blue print).
Q. That is to the south and to the east of the house marked "A"?
A. Yes, sir.

(Witness excused.)

Mr. GORDON: I want on behalf of defendant Shade to interpose a motion for a non-suit on the ground that the evidence makes no case upon which a decree could issue.
Mr. KEYES: The defendant Classen joins in that motion.
The COURT: The motion for a non-suit will be denied.

Mr. GORDON: Exception.
85 The COURT: Exception will be allowed.

(Adjournment.)

10 a. m. January 17th, 1910.

Mr. P. J. CONCANNON, being recalled for further examination, testified as follows:

Direct examination (continued).

(By Mr. HUFFER:)

Q. Referring to Defendant Concannon's Exhibit Number 1, I will ask you to state from what point or where the fence line ran from the point marked "2" in the circle, or rather from the northwest corner of the land that you claim near the point marked two in a circle, to what point did that run eastward?

Mr. DA PONTE: That has all been gone over.

The COURT: Let the witness answer.

A. The fence ran from here at K street up here part way across Boundary Avenue, which is an alley, and in there was a little space here of a roadway (indicating), then the fence continued along there out to J street, and stopped in Boundary Avenue; a roadway turned around Boundary avenue to come in to this little house (indicating on Exhibit Number 1).

Q. Referring to this shed marked B, where did it run?

A. It ran off to where that shed is now; that is not there now; this shed was built where the opening was.

Q. To what point on that shed did it run?

A. I should judge a few feet from where the shed is now.

Q. From which side? The Northwest corner?

A. Yes, and then the fence continued on over there on to J street.

Q. In what direction?

A. That would be east.

Q. Straight east?

86 A. Yes, sir.

Q. Is that the fence that was on the property when Mr. Girard turned it over to you?

A. Yes, sir.

Q. Where was that driveway that was spoken of?

A. Right where Boundary Avenue came onto the property, the driveway came down Boundary Avenue and made a turn onto this property.

Q. What do you mean; indicate where it is on the drawing?

A. Where this letter B is there the driveway came down and came into this property here.

Q. What point, marked what?

A. "B."

Q. How far east did it go?

A. It went maybe a little circular here. This along in here was only a gulch (indicating).

Q. What do you mean by that?

A. This space here (indicating).

Q. How marked in the map?

A. In the east part of where it has this letter "A" here, and all

this in here was filled in afterward; that was a gulch. To get out from this house I built a platform along this fence to get out on J street, built a platform.

Q. You say out from here; you mean from the house marked "A" to J street?

A. Yes, a platform built there on stilts several feet and stopped down here. Since then I have filled in all this corner here.

Q. That is the southeast corner of the tract?

A. Yes. There was no outlet there before that time at all.

Q. You say the roadway ran how far east?

A. Well just so a team could go down here and turn around in here.

Q. About that point where the yellow point makes an angle?

87 A. Yes along in there just in front of this house (indicating).

Q. Just in front of the house marked A?

A. Yes.

Q. Didn't go further east than that?

A. No, it did not go any further.

Q. Did you notice the deeds that were turned over to you, the deed from Bert Smith to Girard and the deed from Girard and wife to yourself, as to whether there was any notarial stamp upon the deeds or not?

A. There was on both of them.

Q. Did you know then what an acknowledgment was on a deed?

A. Yes.

Q. Were those deeds acknowledged?

A. They were.

Q. Were either one of those deeds recorded in the auditor's office?

A. No, they were not.

Q. When Mr. Girard turned this property over to you did he claim to own it?

A. Yes, sir.

Cross-examination.

(By Mr. Da Ponte:)

Q. Why didn't you record those deeds?

A. Well, I do not know, I cannot just say why I did not; the property was almost valueless; one of the reasons was I did not care to expend anything on them at that time.

Q. You were a business man weren't you, a contractor?

A. No, not at that time.

Q. What do you do now?

A. I am and for several years have been a contractor, a would be one.

88 Q. For public work and the like, don't you?

A. Sir?

Q. For street work and such as that?

A. For several years.

Q. You could read at that time?

A. Some.
Q. Been to school hadn't you?
A. Very little.
Q. You knew that deeds ought to be recorded didn't you?
A. I have known since that it should be to make them legal.
Q. How old were you?
A. At that time, 35.
Q. Everything you know about deeds you have learned since, have you?
A. Most all I have known. I did not handle business before that time. The last few years I have made a business man out of myself or tried to.
Q. Never paid a cent of taxes on the land did you?
A. No.
Q. Never knew you had to pay taxes?
A. Well I made inquiries about taxes and so forth.
Q. But you didn't pay any?
A. My money was refused.
Q. Didn't pay any taxes at all?
A. I went to Mr. Richard Welch, who was assessor, to see about the taxes on that property and he said he would look into it and see what the taxes was and when I called later on to see a man who took his place, William Neal, and he said that Richard never said anything about it. He had time before to let me know, but he knew nothing about it.
Q. Did you have any abstract of title to the land?
A. Did not know at that time it was necessary.
89 Q. Didn't know anything about that; didn't know enough to buy a tract of land at that time?
A. I did not know lots at that time, no.
Q. Didn't you know it to be a fact that you could not get title without it came from the sovereignty, the government, down?
A. I did not at that time.
Q. Was that the first piece of land you ever bought?
A. Yes, that is one of the first.
Q. Did you buy the other that way too?
A. I bought other property right in that same block at that time that way.
Q. In the company's right of way too?
A. No,——

Mr. HUFFER: I object to that.
The COURT: Objection overruled.

Q. Don't you know it to be a fact that the map of Root's & Van Dusen's additions, both, show a 200 foot right of way belonging to the railroad?
A. No, I do not.
Q. Never consulted the map?
A. I consulted persons who had and they said it did not.
Q. You didn't look at the map?
A. No, sir.

Q. When did you put this house on there; you say you went on in '98, did you?

A. Yes, sir.

Q. When did you put that dwelling there?

A. I think in '98; might have been '99.

Q. When you went on there the only house that was there, the only improvement, was that little square down on the south line?

A. That and some chicken houses.

90 Q. Where was the chicken house?

A. It was on further towards K street and up from Boundary avenue.

Q. Were those all the improvements that were there at that time?

A. It was fenced.

Q. Is the fence there yet?

A. Part of them. This chicken house was not there (indicating). I moved those and put up other things in place of them.

Q. Who was that deed acknowledged before?

A. I could not say.

Q. You just know it was acknowledged?

A. I know it had a seal on it, and know it was a deed.

Q. Then Mr. Girard is mistaken when he says his deed was not acknowledged?

A. I could not say he was mistaken or not. I know it had a seal and had writing on the back of it the same as I have seen deeds signed.

Q. Acknowledged here in this county was it?

A. I suppose it was; I could not say.

Q. How many acknowledgments are on it?

A. I could not say, but it had a seal on the back of it.

Q. How many seals?

A. One that I know of.

Q. How many more did it have; didn't it have three seals on it?

A. I don't think so.

Q. Just one seal. Do you know it to be a fact that at the time that deed was executed that Mr. Girard's wife was not in this city,—don't you know that?

A. I could not say as to that.

Q. You did not see her there did you?

A. She was living at the place; I saw her at the time I bought the place.

91 Q. She was not down in Oregon then?

A. Not at the time I bought the place.

Q. Did Mr. Girard send the deed down to her to sign?

A. I could not say as to that.

Q. You do not know what he did with the deed?

A. No.

Q. How long since you have seen the deed?

A. I do not remember seeing it for a number of years.

Q. You have lived in the same house all the time?

A. Yes, sir; since I built the house I have lived in it all the time.

(Witness excused.)

92 Mr. WILLIAM E. NANNERY, a witness called on behalf of defendant Concannon, being duly sworn, testified as follows:

Direct examination.

(By Mr. HUFFER:)

Q. Give your full name?
A. William E. Nannery.
Q. Are you familiar with the property occupied by Mr. Concannon?
A. Somewhat.
Q. Shown on this map, Plaintiff's Exhibit "A"?
A. Somewhat acquainted with it.
Q. What is your occupation, Mr. Nannary?
A. Carpenter and builder.
Q. Did you have anything to do with the building of any of those houses?
A. I built the first house he put on there.
Q. He has marked on the map the houses he put on?
A. Why it is right here (indicating); marked dwelling house on that.
Q. Are you familiar with values of property of that kind in that vicinity?
A. I think so.
Q. What is the value of that structure marked dwelling there apart from the land?
A. On that dwelling I should put a value of eight to eight hundred and fifty dollars.
Q. This building down here south on the lot west of the dwelling, shown by the small square, what is the value of that structure apart from the land?
A. This one here (indicating); probably about one hundred dollars.

93 Q. Now the structure which seems to be located in the center of Boundary street, what is that?
A. A barn.
Q. How many stories?
A. Story and one-half barn; 12 feet posts.
Q. What is the value of that structure?
A. Three hundred dollars.
Q. This shed up here adjoining the southwest corner of block 9, half of which is located on the east side of Boundary street, what is the value of that structure?
A. All of one hundred dollars, I think.

(No cross examination.)

(Witness excused.)

Mr. HUFFER: I have another witness, Mr. Palmer, who is having a case of his own in another department. I would like to have him called to testify as to the land.

Mr. DA PONTE: What does he claim it to be worth.

Mr. HUFFER: Five hundred dollars.

Mr. DA PONTE: That will be admitted, that Mr. Palmer would testify if called the value of the land apart from the improvements is five hundred dollars.

The COURT: Is that sufficient.

Mr. HUFFER: That is sufficient.

The COURT: I understand that is your case.

94 *Testimony on Behalf of Defendants R. Shade et ux.*

Mrs. JAMES A. WRIGHT, a witness called on behalf of defendant Shade, being duly sworn testified as follows:

Direct examination.

(By Mr. GORDON:)

Q. You may state your name?

A. Mrs. Mary Wright.

Q. You are the widow of the late James A. Wright?

A. Yes, sir.

Q. Did you and him in his lifetime live in a house out on South J street?

A. Yes, sir.

Q. Near the Northern Pacific Railway?

A. Yes, sir.

Q. I direct your attention to Plaintiff's Exhibit A, this map, and more especially to the piece in pink here marked "R. Shade." Now you may assume that that is the place. Did your husband or you subsequently sell that to Mr. Shade?

A. Yes, sir.

Q. The gentleman sitting to your left?

A. Yes, sir.

Q. When did you build on that tract?

A. 1888.

Q. What portion of the year?

A. In September.

Q. What kind of a building did Mr. Wright put up there?

A. A story and a half.

Q. Frame house?

A. Box house, weather board on the outside.

Q. Shingled?

95 A. Yes.

Q. How many rooms downstairs?

A. Four rooms.

Q. How many upstairs?

A. Two rooms.

Q. Did he subsequently fence in; did he enclose it by a fence?

A. We fenced it, yes.

Q. How long after he completed the building of the house before the fence was built?

A. The same fall.
Q. Did you begin living there?
A. Yes, sir.
Q. When?
A. September 1888.
Q. How long did you continue to live in that place?
A. 1895.
Q. Until 1895?
A. Yes, sir.
Q. Continuously from September 1888 until 1895?
A. Never was away from there.
Q. Of whom did your family consist during that entire time?
A. There was eight of us, my husband and I and six children.
Q. Your husband and you and six children.
A. Yes, sir.
Q. What time in the year 1895 did you remove from there?
A. January 13, 1895.
Q. Now did Mr. Wright claim to own the place?

Mr. Da Ponte: I object to that.
The Court: Objection overruled; exception allowed.

Q. Were you ever disturbed?
96 A. No, sir.
Q. What additional improvements did you put on other than the house and the fence during the time you were living there?
A. Woodshed and chicken house.
Q. Where did you get your water?
A. We dug a well.
Q. How close to the house?
A. Oh it was right at the house.
Q. Within the enclosure?
A. Yes, sir, right against the porch.
Q. What was your purpose in going there with reference to making it a permanent home, or otherwise?
A. Well, we heard the land was vacant and thought we would build there and make it our home.
Q. Why did you sell?
A. Wanted to go to the country with the children.
Q. To whom did you sell?
A. Mr. Shade.
Q. And when was that?
A. Along in March 1895.
Q. Have you lived there since?
A. Not since that, since we sold.
Q. Is Mr. Shade living there now?
A. Yes, sir.
Q. He is the Mr. Shade to whom Mr. Wright sold?
A. Yes, sir.
Q. Do you know whether or not any papers or writings were made on this sale?
A. My husband said he made Mr. Shade a paper.

Q. Did he ask you to sign it?
97 A. He told me I could sign it when I went in, but I did not sign.
Q. What was that?
A. My husband told me I could sign it when I came in to town.

Cross-examination.

(By Mr. DA PONTE:)

Q. From whom did you buy the land?
A. We did not buy the land, we settled on it.
Q. Simply settled on it; knew it was not your land when you settled on it?
A. Sir?
Q. You knew it was not your land when you settled on it?
A. We settled on it. They told Mr. Wright he could homestead it.
Q. Who told him?
A. I do not know.
Q. He never applied to purchase it from the government?
A. No.
Q. Just simply found a vacant piece of land and settled on it, is not that right; land that was not occupied and settled on it?
A. They told us——
Q. Answer the question.
A. We settled on it—yes, we settled on it.
Q. It was vacant?
A. Yes, it was vacant.
Q. Where did that fence run you was talking about; where did you put up your fence; this appears to be the little house (indicating)?
A. Fenced it from the north side down the whole piece.
Q. How close to the house did you fence around?
98 A. Not very close on the north and the west side, but quite a bit.
Q. How far did it run to the south?
A. Ran quite aways.
Q. How far did you have the fence on the south run?
A. Had it all.
Q. You do not know where it ran, how far it was from the house; you cannot tell that?
A. Never measured it.
Q. What did Mr. Shade pay you people for the house?
A. Sixty dollars.
Q. Isn't it a fact that the instrument you gave him was simply a bill of sale?

Mr. GORDON: State whether you know.
Mr. DA PONTE: I submit Mr. Gordon need not prompt his client.
Mr. GORDON: The witness has testified, if your Honor please, that she did not see this paper.

Mr. DA PONTE:

Q. You did not see the paper?
A. No.
Q. You never seen it?
A. No.
Q. You never paid any taxes while you were down there on this land?
A. No, I do not know whether he did or not. I do not think he did. I could not say.
Q. What was the value of that house; what did it cost you, the house you put up there, Mrs. Wright?
A. I could not say how much it cost us.
Q. One hundred dollars?
99 A. I think it cost one hundred dollars.
Q. About in that neighborhood you think?
A. Yes.
Q. And the chicken house; what did that cost you, ten dollars or such a matter?
A. I guess it did.
Q. Something in that neighborhood?
A. Something in that neighborhood.
Q. What did the fence cost—what kind of a fence was it?
A. Just a 1 x 4 rough lumber sawed in two; part of it with that and part of it with shakes.

Redirect examination.

(By Mr. GORDON:)

Q. I understand you to say that Mr. Wright thought it was government land?
A. Yes, sir.
Q. And your purpose in going there was to make it your home?
A. Yes, sir.

Mr. DA PONTE: I object to the counsel putting the words in the witness's mouth.
The COURT: Objection overruled.

Q. Now what were the financial conditions obtaining in this section of the country at the time you sold, as to being hard times or good times, and as to property being dear or cheap?
A. It was cheap.

Mr. DA PONTE: I object to that.
The COURT: Objection is overruled.
100 Mr. DA PONTE: Exception.
The COURT: Exception allowed.

Q. What were the conditions of the times?
A. It was hard times when we sold.
Q. What about property being cheap or selling for fair prices?
A. Property was pretty cheap then.

(Witness excused by defendant Shade.)

101 Mrs. JAMES A. WRIGHT, being called as a witness in behalf of defendant Classen, testified as follows:

Direct examination.

(By Mr. KEYES:)

Q. Mrs. Wright, you were testifying about this whole tract in here; when you first settled on the land you claimed all of this; that is, you claimed where Shade is and Mrs. Classen here is now living?
A. Yes, we had that fenced for a chicken house.
Q. You sold this portion to Mr. Shade you testified?
A. Yes.
Q. To whom did you sell this portion marked "Mary Classen"?
A. We did not sell that. We let a friend of ours build on it.
Q. Who was that?
A. Mr. Penrose.
Q. And do you know who lived on the property; did Mr. Penrose live on it?
A. He lived on it awhile.
Q. Then who lived on it after Mr. Penrose?
A. Mr. Winkler.
Q. Who lived on it after Mr. Winkler?
A. Mrs. Classen.
Q. Do you know how long Mr. Penrose lived on it; do you know when Mr. Penrose went on the property?
A. About a year after we moved on our house.
Q. That would be about 1889?
A. Yes, sir.
Q. Do you know of your own knowledge whether or not that property has been occupied since 1889?
102 A. Yes, it has been.
Q. Has it been fenced?
A. It was fenced.
Q. When was that fence first put around there, if you know?
A. 1898, the same year.
Q. It was fenced in 1898?
A. Yes, sir.
Q. It has been fenced at all times since then?
A. Yes, sir.

Cross-examination.

(By Mr. DA PONTE:)

Q. Where did the fence run, I ask you to describe that fence; can you describe it, where it ran?
A. I guess I could.

The COURT:

Q. Could you indicate on the map where the fence ran?
A. It ran just on the side of Mrs. Classen's house.
Q. The house nearest the Shade house?
A. Yes, sir; it joined our fence.

Q. Where did your fence run; I ask you to describe your fence first?

A. I do not know how many feet from the north; it did not run very far on the west.

Q. It ran close to the house, within 10 feet of the house, did it?

A. Yes, I think it was about 10 feet.

Q. What?

A. And the fence was between Mr. Shade and Mr. Classen, that is, not very far between their two houses, and it ran back
103 to the gulch.

Q. Down south?

A. Yes.

Q. Where did the Classen fence run?

A. Just a little west on the east side of the house.

A. From this house or which one (referring to map); which is the Classen house?

A. On the east side.

Q. Was it fenced on all four sides?

A. Yes, sir.

Q. Who put that fence up?

A. We put part of it up and Mrs. Bitner and Mrs. Penrose, her sister, the rest of it.

Q. You say you did not sell to Mrs. Penrose at all?

A. No, sir.

Q. Penrose came there and you let him build on it?

A. Yes, sir.

Q. What kind of a house did he put up, just about like yours?

A. Yes, about like ours.

Direct examination.

(By Mr. KEYES:)

Q. You told Judge Gordon here when you went upon that land you thought it was government land. Does that answer apply to the portion marked Mary Classen, also?

A. Yes, that was what we understood.

Recross-examination.

(By Mr. DA PONTE:)

Q. What government did you think owned the land?

A. I do not know what.

104 Q. You do not know whether the state government or the United States Government?

A. He said it was government land. Of course he said if ever he homesteaded it would be taken out of his homestead.

Q. If he ever homesteaded?

A. We never used our rights to homestead.

Q. He never homesteaded?

A. No.

(Witnesses excused.)

105 Mr. P. J. CONCANNON, called as a witness on behalf of defendant Shade, testified as follows:

Direct examination.

(By Mr. GORDON:)

Q. Are you familiar with the buildings and improvements on the Shade place; are you Mr. Concannon?
A. Yes, sir, I have been in the house.
Q. A number of times?
A. Yes, sir.
Q. What do you say is the reasonable fair value of the house apart from the land?
A. Between seven hundred and fifty and eight hundred and fifty dollars, along there.
Q. What other improvements, or fruit trees,—what other improvements has he on the house?
A. He has some trees; I could not say what the fruit trees are.
Q. What water does he get there now?
A. City water now, but they used to use a well.
Q. Is the house numbered, has it a street number?
A. I think it has; I could not say as to that.
Q. You do not know whether it has a number. It is connected up to the city waterworks.

Cross-examination.

(By Mr. DA PONTE:)

Q. Is that the same house built there by the Wrights?
A. It has been repaired by Mr. Shade, in the neighborhood of one hundred dollars has been spent on it by Mr. Shade the last year.
Q. Mr. Shade moved in there I believe in 1895?
106 A. Several years ago; it was fixed up some last year; and it was fixed up again, and shingled, this last year.

Mr. GORDON:

Q. Is that shingled?
A. Yes, sir.

(By Mr. DA PONTE:)

Q. This fixing up has all been done since Mr. Shade got it?
A. Yes, almost new before that.

(Witness excused on behalf of defendant Shade.)

Mr. P. J. CONCANNON, being called as a witness on behalf of defendant Classen, testified as follows:

Direct examination.

(By Mr. KEYES:)

Q. Are you familiar with the improvements on the Classen property?

A. I have not been of late; I have been at the place sometime ago.
Q. How long ago?
A. Two or three years ago.
Q. Have not seen them since then?
A. I have seen them but have not been on the place since that time.
Q. Are you in a position to place a value on those improvements at this time?

A. As near as I can recollect the house is a large square
107 house a story and a half, probably of the value of eight or nine hundred dollars, from the appearance on the outside. I have never been in the Classen house; been at it but never in there.
Q. There is a shed down here?
A. Other buildings; I could not say what they are.

Cross-examination.

(By Mr. Da Ponte:)

Q. This south part of the Shade and Classen property, is that down the hill?
A. I think it is all upon the hill, as near as I can recollect.
Q. Isn't there a steep bluff there?
A. Goes out on a shelf, then drops almost down.
Q. This is before it drops down?
A. I should judge it drops down over here.
Q. The track then is at the foot of the bluff?
A. Probably a hundred feet or so away.
Q. Down?
A. Yes.
Q. Measured at right angles?
A. I have measured my own.
Q. That shows correct according to your measurements (referring to Exhibit "A")?
A. The foot of my cribbing is over a hundred feet from the tracks; 130 feet is the closest I am to the tracks.
Q. And these parties are within that hundred feet?
A. I think part of theirs,—probably a strip along in the back part of theirs is.
Q. You never measured that there?
A. Excepting I was there when the surveyors were out there; I never measured it.

Q. You have never measured it at right angles from the
108 track, straight back from the track. You measured up and down?
A. At my own I measured across.
Q. Out there you sighted down?
A. I sighted along the surface.

(Witness excused.)

Mrs. JAMES T. WRIGHT, being recalled on behalf of defendant Shade, testified as follows:

(By Mr. GORDON:)

Q. When did the Shades move into this place, considered with reference to the time you moved out?
A. I moved out and left my husband and son there; Mr. Shade moved in before I had all of his things out.
Q. When was that?
A. That was in March 1895.

(Witness excused.)

109 Mr. R. SHADE, one of the defendants, being called and sworn in his own behalf, testified as follows:

Direct examination.

(By Mr. GORDON:)

Mr. GORDON: I will say to your Honor and counsel that we will not make any claim to so much of the property which is enclosed,—known as the Shade place,—which is within the one hundred foot line; that is, we shall claim only on that which is outside,—which is more than one hundred feet from the center line of the main track, as originally constructed.
Mr. DA PONTE: Will you file a disclaimer.
Mr. GORDON: We will file a disclaimer.

Q. Mr. Shade where do you live?
A. South J.
Q. What number?
A. 2935 South "J".

Mr. GORDON: We will not dispute your map.

Q. You may assume this is the place referred to, that colored pink on Plaintiff's exhibit "A"; this is J street (referring to map)?
A. Yes, just below the sidewalk.
Q. What is this enclosed black square to the north outside of the one hundred yard line drawn through there, is that the house?
A. Yes, house.
Q. When did you begin living there?
A. Well, now, I never kept any date of it, but I have been living there 16 years the 5th of March next; I never kept any date of the time we went there.
110 Q. How old are you?
A. Seventy-two on the 11th of next August.
Q. Have you a family?
A. Yes, sir.
Q. Of whom do they consist; how many members of your family?
A. Four; two boys and two girls.
Q. Do they live there with you?
A. Well my youngest daughter and youngest son is living there now; my oldest son is not at home.

Q. When you moved in there did you take your family with you?

A. Yes, sir.

Q. You have been there ever since; that has been the residence of yourself and family ever since?

A. My brother-in-law and eldest son went there and slept there during the time she was cleaning——

Q. Have you lived there with your family ever since you went in there?

A. Yes, sir, ever since.

Q. Describe the house, Mr. Shade?

A. The house is 25 by 25 feet; story and a half high; four rooms downstairs; 12½ feet by 12.

Q. Frame?

A. Yes, sir.

Q. How is it finished?

A. Lined and papered inside; sheeted over; porch outside, railing and lattice work.

Q. Are the sides shingled?

A. Yes, I put on about 8,000 shingles last summer; shingled it all around.

Q. Any painting on it?

A. Paint on the corners and on the doors, window frames;
111 the rainy season set in and I did not have a chance to paint the shingles.

Q. The record may show what color the paint is?

A. It is green.

Q. What do you say is the value of that house?

A. Between seven and eight hundred dollars I think is the value; I got a good cellar underneath.

Q. What kind of cellar?

A. It is just dug out, squared up.

Q. Is it walled?

A. No walls in it, no; it is closed in all around, with a door, and with shiplap.

Q. What water system have you got, if any?

A. I get my water from the city.

Q. It connects with the city water?

A. Yes, sir.

Q. What other improvements have you on the place, and when did you put them on?

A. I got some fruit trees and I built a walk down about 65 feet from the back part of the yard to the toilet, three feet wide, two inch plank.

Q. Have you a fence?

A. Yes, I got a picket fence around there.

Q. How long has it been fenced; was it fenced when you got it?

A. Yes, all fenced when I got it.

Q. Have you kept up the fences?

A. Yes, I put up a new picket fence about three years ago.

Q. What did you say is the value of your improvements outside of the house and apart from the land?

A. Well I could not make no estimate; I do not know what the fence cost me. It is all new, posts and everything; I could
112 not say what it would be worth; the woodshed don't amount to much; I pile a good deal of wood in the cellar.

Q. What is your business or occupation?

A. I have always followed the engineer business.

Q. Marine engineer?

A. Marine engineer.

Q. From whom did you secure this place?

A. From Mr. Wright.

Q. When?

A. It will be 16 years next March.

Q. How long had he been living on it prior to the time you bought it, if you know?

A. I do not know; could not say anything about it.

Q. Did you know he had been living there?

A. No,—he had been living there a couple of years; I was working for the city and living on K street.

Q. Were you not pretty well acquainted before you bought?

A. Yes, I knew Mr. Wright pretty well.

Q. What experience in business matters had you had?

A. Always been honest man, trustworthy man in all his dealings.

Q. You are speaking of Mr. Wright now?

A. Yes.

Q. What experience, if any, did you have in business matters?

A. Nothing only just I bought this place from him.

Q. What did you get from him to show you bought it, if anything?

A. I got a piece of paper; I did not look at it.

Q. Who prepared the papers?

A. Well, I could not tell you that either. I paid him the money and he gave me the paper and where the paper has gone to I don't know.

Q. Did you ever try to record it?

113 A. No, sir.

Q. Why?

A. Never thought about it.

Q. You had confidence in Mr. Wright?

A. Yes, I had every confidence in the world; I wanted the place,—I was living on K street paying twenty dollars a month rent, and I told my wife we can buy this place from Mr. Wright for fifty dollars and save us the twenty dollars a month rent.

Q. What was the condition of the times?

A. Dull times; you could buy property at most any figure.

Q. Ready money would get considerable property wouldn't it?

A. Yes.

Q. Have you claimed at all times to own it?

A. Yes.

Q. Has anybody ever questioned your right?

A. No, never interfered with me at all that I know of. I never heard they ever did.

Q. You always considered that you owned it?
A. I always considered it my home, bought it for a home and been living there ever since.
Q. Did not feel any concern about your title?
A. No, no one has ever bothered me at all.
Q. This Mr. Wright that you bought from is the husband of the witness Mrs. Wright that was on the stand this morning?
A. Yes, sir.

Cross-examination.

(By Mr. DA PONTE:)

Q. That is the same house on there now you bought from Mrs. Wright, is it?
A. It is the same house with the exception of an addition I
114 built on *of* it some years ago.
Q. How much addition?
A. About eight feet the whole length of the house; I think Mr. Winkler lived next door to me at the time, he built on an addition for me; it was not big enough for my family.

Mr. R. SHADE, being recalled as a witness on behalf of the defendant Classen, testified as follows:

Direct examination.

(By Mr. KEYES:)

Q. You know Mrs. Classen don't you, Mr. Shade?
A. Yes, sir.
Q. How long has she been living there?
A. I could not say how long; I have been in and about on the Sound a good deal of the time; I never kept no track about it; I know she has been living there several years.
Q. You do not know how many years after you came?
A. I could not tell you.
Q. Do you know who lived there when you came in?
A. Mr. Winkler.
Q. To whom did he sell if you know?

Mr. DA PONTE: I think we are entitled to have the parties produce the title papers.
The COURT: It may be admitted at this time.

Q. To whom did Mr. Winkler sell, if you know?
A. As far as I know he sold to Mrs. Classen and she has been living there ever since.
115 Q. This is while you were up in British Columbia, was it?
A. Yes, I was up in British Columbia on the Lakes at that time.
Q. And how long about was that after you had bought your property there?
A. I do not know, I am sure; I could not tell you.

(Witness excused.)

Mr. GORDON: Mr. Shade's case is all in.

116 Mrs. MARY J. CLASSEN, one of the defendants, being called as a witness in her own behalf, being duly sworn, testified as follows:

Direct examination.

(By Mr. KEYES:)

Q. Your name is Mary J. Classen?
A. Yes.
Q. You are the defendant in this suit, are you?
A. Yes.
Q. Where do you reside now, Mrs. Classen; just give me the street number if there is one?
A. 2935½ South J.
Q. Is that represented on this map here by this blue portion?
A. Yes, that is my house.
Q. Is that your house here?
A. Yes. And that is the woodshed there (indicating).
Q. How long have you lived there, Mrs. Classen?
A. Fourteen years.
Q. Have you lived there continuously for 14 years?
A. All that time.
Q. Are you living there now?
A. For the present time all alone.
Q. And you have lived there for the past 14 years have you?
A. 14 years.
Q. From whom did you get it?
A. From John Winkler.
Q. Who bought it from Mr. Winkler?
A. My husband John Classen bought it from Mr. and Mrs. Winkler.
Q. Are you living with your husband?
A. Since 1907 I have been living alone there.

117 Q. Mrs. Classen, what is the nature of your house,—large or small?

A. Seven room house; it is painted, papered on the inside; has double walls, painted outside; in good condition.
Q. Papered and painted inside and painted outside and has double walls?
A. Yes.
Q. Has it a cellar?
A. Yes, sir.
Q. Water on the premises?
A. Yes, sir.
Q. City water?
A. Yes, faucet in the front yard and faucet in the kitchen.
Q. Have you made any other improvements there?
A. Planted 15 fruit trees there.
Q. Trees planted around the house there?
A. Yes, on the place there.
Q. And is that plot of ground fenced?
A. Yes, fenced all around.

Q. How long has it been fenced?
A. All the time since we bought it; fenced all around.
Q. Fenced when you bought it?
A. Yes, clear around.
Q. Do you know how long Mr. Winkler had been in possession before you bought it?
A. Eight years.
Q. You say this was fenced when you bought it?
A. Yes, all around.
Q. Has the Northern Pacific Railroad Company or the Northern Pacific Railway Company or anyone else ever made a claim
118 to that property up to the time of the beginning of this suit?
A. No, they never bothered us.
Q. You have never been bothered at all you say?
A. No.
Q. Was there a writing from Winkler to you or your husband, if you know?
A. My husband received the writing from Mrs. Winkler; she sent for it to Oakland, California; he wrote back and sent a little slip of paper.
Q. You secured a divorce from your husband did you not in 1908?
A. No, my husband divorced me; I did not secure any divorce; my husband divorced me.
Q. In the division of the property that was made at the time of that divorce, was this property taken into consideration?

Mr. DA PONTE: I object to that you cannot prove a decree of distribution by parol testimony; it is not material anyhow, your Honor.

The COURT: Objection sustained.

Q. Have you improved the house any since you bought it from Mr. Winkler?
A. Enlarged two rooms, kitchen and dining rooms; painted it around the ceilings and upstairs, furnished the upstairs up; it was not finished upstairs.
Q. You entered into possession of that in 1897?
A. The third of April, 1897.
Q. You had a family, did you?
A. Yes, my daughter got married; two of my sons ain't home.
A. The fence.
—. ——.

Cross-examination.

119 (By Mr. DA PONTE:)

Q. Can you describe where that fence ran, Mrs. Classen?
A. The fence; yes I can. The fence that was there when I bought the place was running here, from this corner up to here, took that lot in there (indicating on Plaintiff's Exhibit A.) I got a photograph at home that shows the old building. Then over up here was a rose bush, and there was a fence (indicating).

Q. Where did it run on the south?
A. Straight line clear down out here, I believe.
Q. Was not fenced over here at all? (Indicating.)
A. Fence,—you could not walk there.
Q. Did Winkler put a fence in here?
A. Half of the fence was owned by him and half by the other party; here in the middle was a gate here.
Q. You never paid any taxes on that?
A. No, my husband attended to the real estate business; I do not know.
Q. How long have you been divorced?
A. Three years.
Q. You never paid any taxes?
A. No.

(Witness excused.)

120 *Rebuttal.*

Mr. G. H. PLUMMER, a witness called on behalf of the plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct examination:

Q. Mr. Plummer, you are the general western land agent for the Northern Pacific and the Northwestern Improvement Company?
A. Yes, sir.
Q. You have charge of the right of way matters?
A. Yes.
Q. How long have you been in the land department here for the Northwest Improvement Company and the Northern Pacific?
A. Since 1895.
Q. Were you connected with the company prior to that time?
A. No.
Q. Now will you please state whether you ever knew or heard of any adverse claims being made against the Northern Pacific by these defendants, Concannon, Shade and Classen on this property; was any notice ever brought to the company?

Mr. HUFFER: Defendant Concannon objects to the question as being incompetent and immaterial.
Mr. KEYES: Classen joins in that objection.
Mr. GORDON: Mr. Shade joins in that objection.
The COURT: The objection may be considered as made by all.
Mr. DA PONTE: I want to show that these parties never made any claim against the company which the company is aware of. That if they had any adverse claims no notice of its was ever brought to the company; then go further and show the nature of their pos-
121 session and how it was regarded, and show the permissive nature of their occupancy, although we were charged with knowledge of the fact that they were there. They claim they were claiming the land. I want to show that no claim to that land was ever brought to the company, and we will show further why it was

that at that time, prior to the decision of the Supreme Court of the United States, it was not believed by the company that adverse title would ripen against it by limitation; and to simply show that we never acquiesced in these claims.

The COURT: Objection sustained; exception allowed.

Mr. DA PONTE: Am I permitted, your Honor, to show that the company while it knew that these parties were on the ground, that it did not oust them simply because we did not need the land, but simply permitted them to stay there?

The COURT: I think counsel better put his question, and if they have any objection they can make it.

Q. Has the railroad ever needed this property in controversy for railroad purposes?

Mr. GORDON: I object as immaterial.

The COURT: I ruled against you on the former question. The question was whether they only claimed it adversely; the only purpose of the court's ruling was that they claimed they held the property by adverse possession; that was a matter of law anyway. I think if there are any statements made between the parties, it might be shown.

Q. Has the company ever needed this right of way for railroad purposes?

Mr. HUFFER: Defendant Concannon objects as immaterial and irrelevant.

The COURT: Objection overruled to the question just asked.

Q. Have the company ever needed this property in controversy here for railroad *parties?*

A. No, sir.

122 Q. How is that situated with reference to the track then?

A. It lies above the track at a height*h* varying from 90 to 110 feet, I should judge, up on an upper bench and away from all of the railroad tracks of the railroad grade.

Q. Now has the company ever made any general attempt to clear off its right of way from all parties who were living on it?

Mr. GORDON: I object to that as immaterial on behalf of Shade. These things they determine among themselves without bringing them to the attention of the parties, and cannot be given in evidence. It is self-serving to say what the purpose of the road is, so long as the purpose is inactive.

The COURT: I will overrule the objection for the present.

Q. Has the company ever made any general effort to clear its right of way of these parties, and if not explain why.

The COURT: Yes or no, Mr. Plummer?

A. No, sir, it has not.

Q. What is the reason for that?

Mr. GORDON: We object to that on behalf of defendant Shade; all of the defendants.

The COURT: Objection sustained.

Q. Has it been the practice to disturb these parties who go on the right of way until the land is needed for railroad purposes?

Mr. HUFFER: Same objection.

The COURT: Is it your purpose to bring a specific notice to these parties?

Mr. DA PONTE: Notice of what?

The COURT: Notice?

Mr. DA PONTE: I simply wanted to show we did not disturb these parties; they simply stayed there and the property not being needed they were permitted to stay there.

123 The COURT: Objection overruled.

Q. It has not been the custom to disturb any parties that have settled upon the right of way?

A. We have made investigations from time to time and noted the improvements, but we have never disturbed them because we have felt secure in our title.

Q. Has the company been claiming this land, carrying this land on its maps as its right of way?

Mr. GORDON: That is objected to as immaterial, and incompetent.

The COURT: Objection overruled.

Q. The company has carried on its right of way rolls and on its plats the 400 foot right of way there, this track as shown on the plat here (indicating), and we have paid taxes on it.

Mr. HUFFER: We object to the latter part of the question as not being responsive; also immaterial and irrelevant.

The COURT: Objection overruled.

Q. Did you ever hear of any claim made by these defendants to own this land?

A. To own this land,—no, sir.

Q. When is the first you heard of any such claim as they now make, to own this land?

A. Not until after these services were made, the efforts to straighten out the title.

Q. The time these suits were brought?

A. Yes; we had no idea they were claiming adversely to the company.

Mr. GORDON: That question is objected to as self-serving, and objected to as immaterial and irrelevant.

The COURT: Objection sustained and answer stricken.

Q. These other parties,—Thatcher and the others; have they been ousted and required to take leases from time to time?

Mr. GORDON: That is objected to as immaterial.

124 The COURT: Objection sustained.

Cross-examination.

(By Mr. GORDON:)

Q. Mr. Plummer, you say that while you had no notice from these parties that they were claiming adversely, the company did know of their presence on the property?
A. Yes, sir.
Q. Gave them no notice to vacate or leave?
A. No, sir; not that I know of.
Q. Didn't ask them to pay rental?
A. No, sir.
Q. Asked for no recognition of your title or rights?
A. No.
Q. Didn't ask them to make any agreement subordinating their holdings to your superior title?
A. We did not think it necessary.
Q. You did not do it?
A. We did not think it necessary.
Mr. GORDON: That is all so far as Mr. Shade is concerned.

Cross-examination.

(By Mr. HUFFER:)

Q. When you answered that you had paid taxes upon this property, all you meant by that is that the Northern Pacific Railway Company paid taxes upon its right of way in Pierce county as an entirety; by the lineal foot?
A. Yes; and in more detail than that, we show by plats. We show on our plats the widths of the right of way and the area claimed to be owned by the company; their various subdivisions.

125 Mr. HUFFER: I move to strike that answer as not responsive; also immaterial and irrelevant. The witness spoke of having paid the taxes upon this property. I want to show that what the company paid taxes upon was this right of way in Pierce county by the lineal foot; not as to what the practice in their office is.
The COURT: Objection will be overruled.

Q. That is, what the company paid its taxes upon is the right-of-way in Pierce county as an entirety?
A. Yes, but as I stated we returned the lineal feet of track through each sub-division, also the width of the right of way and the area.

Mr. DA PONTE:

Q. Returned to the assessor you mean?
A. Yes. And the taxes are paid on those returns.
Q. You mean that the company returns its right of way to the assessor as being 400 feet wide, 200 feet on each side of the center line?
A. Yes, sir.
Q. Throughout Pierce County?
A. That is not literally true; in some places it is not 400 feet wide; in such places we return the right of way that we own.

(By Mr. GORDON:)

Q. The tax receipts that you get do not describe your right of way by subdivision?
A. No, sir.
Q. But the receipts are for taxes paid for your right of way?
A. Yes, sir.

(By Mr. DA PONTE:)

Q. Mr. Plummer, if the company had known that these defendants were claiming to be the owners of this land in hostility
126 to the company, would a suit have been brought against them before it was?
A. Yes, sir.

Mr. KEYES: That is objected to as clearly immaterial, and we move that the answer be stricken.
The COURT: Objection sustained. The answer may be stricken.

(Witness excused.)

127 Mr. F. A. STOTLER, being recalled as a witness in rebuttal, testified as follows:

Direct examination.

(By Mr. DA PONTE:)

Q. What maps have you there?
A. Three maps; one being the city map showing Smith & Root's and Van Dusen's Add.
Q. I will ask you to state whether on those maps, this Smith & Root's First Addition to Tacoma, that is this shown on our Exhibit "A" (indicating)?
A. Yes, sir.
Q. And the other is the Van Dusen's addition which borders this property?
A. Yes, sir.
Q. I will ask you to state whether or not on all of these maps the railroad company's right of way is shown to be 400 feet?

Mr. HUFFER: That is objected to as incompetent, irrelevant and immaterial; not proper rebuttal.
Mr. DA PONTE: They claim that their so called deed claimed to call for the boundary of the Root's Addition. I want to show it for that purpose, and besides I want to show that this is a recognition, a general recognition in the community in that neighborhood by parties who own that property that the Northern Pacific Railroad Company own a 400 foot strip out there; that the parties who own the land and who resided there, recognized the title in the railroad company, a recognition of our ownership. They claim that they did not know anything about the right of way, how wide the right of way is.

I want to show a general recognition by these property
128 owners. These maps were on file on record for them to refer to. They made no inquiry; they could easily have found out if they had been disposed to.

(Argument by counsel.)

The COURT: You are not offering the maps. Objection will be sustained to the question.

Mr. DA PONTE: Your Honor, I offer the maps in evidence then.

Mr. HUFFER: Same objection.

The COURT: Objection noted and overruled; exception allowed.

Q. Referring to this map, Mr. Stotler,——(interrupted.)

Mr. HUFFER: Another objection. I am not satisfied that that is a true copy of the plat of the addition as filed in the auditor's office, so I object to them on the ground that they are not competent, because not certified.

The COURT: The objection will be overruled and exception allowed.

Q. What is the scale on that map?

A. The scale on this, being the city map,—the scale is 200 feet to the inch on the city map.

Q. Following that scale with reference to the property in controversy, which is Smith and Root's, and Van Dusen's addition?

A. Why Smith's addition is in here (indicating).

Q. Where would be the location of the property in controversy?

A. Concannon's piece would lay I should judge possibly there—(indicating).

Q. And Classen's?

A. Classen is in here (indicating).

Q. According to that scale, what width is shown on the map there?

A. The width here, it runs to the block line here,—runs the same way to block 10. Here it is 200 feet, 200 feet on the south side.

129 Q. Two hundred feet on both sides where it joins Van Dusen's Addition?

A. No regular lines drawn there; the block lines run to where they terminate at the end of the block line.

Q. Take the other map, Root's addition,—the Van Dusen's Addition, I mean, the other map you had here?

A. Why this is Boundary street here (marks with pencil), and Concannon lies in this vicinity here; and Shade's and Classen's here (marking on map with pencil).

Q. Now what is the scale on this map?

A. The scale on this map. This copy of the original, that part of it is cut off down there,—I think that this is one-eighth of an inch to sixty feet.

Q. What is the right of way?

A. The right of way shown terminates at the block line.

Q. What is the width shown?

A. That is 35; this corner here is 80; this is 150, right in front of Shade's there; at Concannon's it is 160 feet there.
Q. That is to the block corner?
A. Block corner.
Q. This is a plat of the addition?
A. Yes.
Q. Now the right of way lines are not shown there further than to the block corners?
A. I assume that the right of way lines are the block corners; and they considered that as the end of their addition as they platted it.
Q. None of this in here was ever platted (indicating)?
A. Not the Van Dusen's addition, the official map.
Q. This is the map which they put of record?
A. It is a copy of the original survey and which is filed.
130 Q. By Van Dusen?
A. Filed in September 18, 1883?

Mr. HUFFER: That is all incompetent, your Honor.
Mr. GORDON: I would like to add the objection that it is not proper rebuttal if it is not too late.
The COURT: I will overrule the objection because it is too late.

Cross-examination.

(By Mr. GORDON:)

Q. Isn't it a fact that a little bit further south along the line the company permitted manufacturers to build a structure that is 40 or 50 feet on the land?
A. Which way do you mean.

Mr. DA PONTE: That is objected to as it is in another quarter.
The COURT: Objection overruled.
Mr. DA PONTE: There was an entry ahead of his; we do not claim the right of way in the other quarter; there was a prior entry.

Mr. GORDON:

Q. As a matter of fact then, to the west, or as you say, south, the next sub-division, that right of way is only one hundred feet is it not?
A. I could not say.
Q. You know, however, that there are buildings and mill factories right along within 25 or 30 feet of the track there?
A. Well I could not say as to that without making personal investigation.
Q. I thought you were familiar?
A. You speak of the west; I do not know where you mean.
Q. Towards Portland?
A. Designate some point.
131 Q. I will say the next subdivision adjoining this going towards Portland?
A. I believe that is in dispute now, the prior entry.

Q. I am not asking about disputes; I am asking for a fact. Isn't it a fact that there are factories,——

A. I will answer the question: The other side of Mailey street I believe it is 200 feet wide there, 200 feet from the center line.

Q. What about the buildings, structures and manufacturies?

A. Buildings there.

Q. Closer to the track than 100 feet?

A. Yes, sir.

Q. Doing business with the railroad companies?

A. Yes, sir.

Q. They have leases too, don't they?

A. Yes, sir.

Cross-examination.

(By Mr. HUFFER:)

Counsel has stated that there was a prior entry of land opposite Smith and Root's Addition; you did not have 200 feet of right of way by prior entry; it is shown as 200 feet isn't it?

A. Yes, sir.

Q. Shown on this map as a 200 foot right of way,——

A. I am not speaking from the records.

Q. Yes, I know.

Cross-examination.

(By Mr. KEYES:)

Q. Don't you know as a matter of fact that one place be-
132 tween here and South Tacoma your right of way is only eighty feet?

Mr. DA PONTE: I object to that.

The COURT: Objection sustained.

(Witness excused.)

The COURT: I will hear the argument at another time.

Testimony closed.

133 January 23rd, 1911—2.00 p. m.

BRUCE JENNNINGS, called and sworn on behalf of Plaintiff, testified as follows:

Mr. DA PONTE: Plaintiff offers to show by this witness that he has seen the instrument under which defendant Classen claims——

The COURT: Let the record show that you requested that the case be opened for the purpose of receiving further testimony?

Mr. DA PONTE: Yes.

Mr. KEYES: I would like to ask counsel what he expects to show by this witness.

The COURT: You may state.

Mr. HUFFER: As I understand it, the motion or application to reopen the case is as far as the defendant Classen is concerned and not the other defendants.

The COURT: State your offer.

Mr. DA PONTE: Plaintiff offers to prove that the witness was shown an instrument by Mrs. Classen under which she claims and he served papers in the case on her recently and that the instrument is simply a Bill of Sale of the lands and conveyed no land whatever. Counsel states that he learned of this fact last Saturday, since the evidence was closed and did not know until then that the instrument was in existence.

Mr. KEYES: Defendant Classen objects upon the ground that it is incumbent for plaintiff to serve us with a notice, ordering us to produce the written instrument or upon our failure to do so, that he will offer evidence upon that written instrument and for that reason objects, plaintiff not having complied; second, defendant Classen objects upon that ground that she is taken by surprise. The case has been closed. There was no claim on her part at the
134 time of the direct examination that the instrument had been lose; she was not interrogated by counsel for plaintiff on that score and she was not called upon to produce it at that time, if there was such a writing in existence.

Mr. DA PONTE: Do you deny there was such an instrument?

Mr. KEYES (continuing): And for these two reasons defendant objects. And certainly emphasizes the fact that this is the day for argument. The defendant is not present and is not able to have her confronted by this witness——

Mr. DA PONTE: I am willing to let them have a chance to produce this instrument.

The COURT: No demand has been made for the production.

(Argument.)

Objection overruled.

Exception allowed defendant Classen.

Direct examination.

(By Mr. DA PONTE:)

Q. What is your name?

A. Bruce Jennings.

Q. You are employed by the Northern Pacific in the Legal Department?

A. Yes, sir.

Q. Did you serve papers on Mrs. Classen in this case?

A. Yes, sir.

Q. Did she show you any instrument or document purporting to be involved in this case?

A. Not at the time of service but on the 21st day of December when I was with the surveying crew showing them the encroachment in question——

Q. State what she showed you there?

A. At that time she showed me what purported to be a bill
135 of sale of the house only, but designated the house as a certain number on J street, 2935½ south J; it made no mention of anything other than the house.

Q. Where was it dated?

A. At Oakland, California, sometime in 1896 is my recollection of the time.

Q. Did she state that was the paper she claimed under?

A. Yes, sir.

Q. When did you first tell me about that?

A. Last Saturday.

(Witness excused.)

Mr. KEYES: I would like to have the record show that this is all done after argument in this case,—that testimony had heretofore been introduced and that defendant Classen was not present in court at the time the testimony and evidence given by Mr. Jennings was offered.

Mr. DA PONTE: Let the record show that if counsel for defendant is willing to produce the document in Court—(interrupted).

The COURT: The record may show the facts stated by Mr. Keys, and if you desire an opportunity to rebut—to produce further evidence——

Mr. KEYES: No.

136 "That previous to the commencement of the trial of the above entitled cause, to-wit: on the 14th day of January, 1911, the following stipulation was made and filed herein, to-wit:

"In the Superior Court of the State of Washington for the County of Pierce.

No. 28618.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Plaintiff,
vs.
P. J. CONCANNON et ux., Defendants.

Stipulation.

It is stipulated and agreed that this action shall be confined to that portion only of the land described in plaintiff's complaint which is situated in the Northeast quarter (N. E. ¼) of the southeast quarter (S. E. ¼) of Section eight (8), Twp. 20 North Range three (3) east W. M.

GEO. T. REID,
J. W. QUICK, AND
L. B. DA PONTE,
Attorneys for Plaintiff.
HUFFER, HAYDEN & HAMILTON,
Attorneys for Defendants Concannon and Wife.

Filed June 14, 1911."

HUFFER, HAYDEN & HAMILTON,
Attorneys for Defendants
P. J. Concannon and Wife.

P. O. Address: 310 Fidelity Bldg., Tacoma, Washington.

137 STATE OF WASHINGTON,
County of Pierce, ss:

I, Ernest M. Card, one of the Judges of the Superior court of the State of Washington, in and for the county of Pierce, and the Judge before whom the foregoing cases of Northern Pacific Railway Company, a corporation, Plaintiff, vs. P. J. Concannon, et ux., defendants; Northern Pacific Railway company, a corporation, plaintiff, vs. R. Shade, et ux., defendants, and Northern Pacific Railway company, a corporation plaintiff, vs. Mary Classen, Defendant, were heard and tried, do hereby certify that the matters and proceedings embodied in the foregoing statement of facts are matters and proceedings occurring in the trial of said causes, and that the same are hereby made a part of the record therein; and

I further certify that the said statement of facts contains all the material facts, matters and proceedings heretofore occurring in the trial of said cause and not already a part of the record therein; that said statement of facts, with the exhibits attached thereto, are hereby made a part of the record in said cause, the Clerk of this court being hereby instructed to attach the said exhibits thereto.

Counsel for the respective parties being present and concurring herein, I have this day signed this statement of facts.

In witness whereof I have hereunto set my hand this 22 day of April A. D. 1911.

ERNEST M. CARD, *Judge.*

138 Service of copy of within Statement of facts acknowledged this 6th April 1911.

STALLCUP & KEYES,
Attorneys for Classen.
HUFFER, HAYDEN & HAMILTON,
Att'ys for Dft. Concannon et al.
GORDON & ASKERN,
Att'ys for Def't Shade.

139 Department of the Interior,
General Land Office.
243,195. Washington, D. C.
B.
S. E. H.

December 3, 1910.

I hereby certify that the annexed copy of Receiver's Receipt is a true and literal exemplification from the original in this office.

In testimony whereof I have hereunto subscribed my name and

caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

140 4926. M. L. 243,195.

Receiver's Office, at Olympia, W. T.

Received from Welter C. Wallace of Pierce County, Wash. Terr'y, the sum of Two Hundred — and — cents; being in full for the E. ½ of S. E. ¼ *quarter* of Section No. 8 in Township No. 20 North, of Range No. 3 East, containing 80 acres and — hundredths at $2.50 per acre. D. S. No. 3203, Filed May 29th, 1874, to date Aug. 16, 1873, as per letter "G" May 6, 1974.

$200.

ROBERT G. STUART, *Receiver.*

141 No. 9771.

En Banc.

Filed Oct. 7th, 1913.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
v.
P. J. CONCANNON and WIFE, Respondents.

SAME, Appellant,
v.
R. SHADE and WIFE, Respondents.

SAME, Appellant,
v.
MARY CLASSEN, Respondent.

As will be seen by reference to the title, several cases, involving adverse claims to a part of the original grant of a right of way to the Northern Pacific Railroad Company, nor Northern Pacific Railway Company, have been consolidated. Judgments were entered in the court below holding title to be in the claimants, and the company has appealed.

The case of Concannon will be first considered. By the terms of the act of July 2, 1864, the Northern Pacific Railroad Company was granted a right of way of 200 feet on either side of its main line to be thereafter definitely located. In Northern Pacific Railway Co., v. Townsend, 190 U. S. 267, it was held that no part of the right of way as originally granted could be acquired under a state statute of limitation, inasmuch as the grant had been made for a distinct purpose carrying an obligation to the United States government,

and could not therefore be voluntarily alienated; that to so allow, would permit that to be done indirectly which could not be done directly. It seems that the railway company had conveyed parts of its rights of way, and, following the decision in the Town-
142 send case, the passage of an act was procured legalizing all such conveyances. This act and its effect engaged the attention of the court in Northern Pacific Railway Co., v. Ely, 197 U. S. 1, and it was there held that the act of 1904 operated to confirm titles acquired within the 200-foot but without the 100-foot limit, by adverse possession, as well as those acquired by deed. The land claimed by Concannon lies without the 100-foot limit. His possession comes through one Smith, who settled on the premises in 1885. Smith sold to one Girard in 1892. So far as the record shows, Smith may have been a squatter. His position is unexplained. Girard fenced the land and made some improvements thereon. Girard remained in exclusive possession of the premises until 1898, when he sold to Concannon, who has added to the improvements so that they now possess the character of a permanent home and are of the value of from $1,500 to $2,000, as estimated by the witnesses. Girard testifies that he received a deed from Smith, and that he gave this deed and his own to Concannon. Concannon swears that he received a deed. None of these instruments were recorded, and according to the testimony of Concannon, they are now lost. Although neither of these witnesses can remember who made out the deeds, they agree in a general way as to the description of them, and both say that the recited description of the land was such as to include the disputed tract. Both insist that it was their intention to claim the land as against the world, and Concannon says that he tried to get an abstract, but was put off by the abstracter, who told him that it involved more than 150 instruments and would be too expensive. He also swears that he offered to pay taxes, but was refused the privilege because the land had not been listed.

It is the contention of the appellant that the occupants of the land had been mere squatters and, under the rule of Blake v. Shriver, 27 Wash. 593, and Northern Pacific Railway Co. v. Devine, 53 Wash. 241, had no interest which they can assert against the company. But we think that the case made by Concannon
143 takes it out of the rule of these cases. His holding was at all times hostile to the true owner. The character of his improvements was such as to challenge appellant's interest, and at all times appellant had notice and knowledge of the occupancy, as well as the character of the possession and improvements. But relying upon the rule of law as announced in the Townsend case, appellant did nothing although admitting, through its general western land agent who was a witness in its behalf, that from time to time it made investigations and noted the improvements, but it did nothing to disturb the occupants because it felt secure in its title. Neither did it serve any notice upon Girard or Concannon that would indicate an intention to assert ownership in the premises occupied. In the Shriver case the improvements were of such character as to indicate a strolling, straggling occupancy, and were

clearly insufficient to constitute a notice of adverse possession. The same principle was applied in the Divine case, where the improvements were of such character as to indicate that the occupant had no faith in his possession and no intention to hold other than by permission of the true owner.

It is insisted, however, that the possession of Concannon, which dates from 1898, cannot be tacked to that of Girard, and, without it, his title cannot be sustained. The rule as we understand it to be is that, where there is a privity of interest, such possession can be tacked. We grant that the evidence of the deeds from Smith to Girard and from Girard to Concannon is unsatisfactory, and, without the aid of the other circumstances and conditions which we have noticed, would hardly be sufficient to sustain a claim of right or show color of title. But, as we view the law, Concannon has to his own credit a possession of ten years which has been admittedly hostile to the appellant.

Appellant assumes that the act of 1904 is confirmatory only of conveyances that had been theretofore made or titles that
144 were complete by adverse possession on April 28, 1904, the date of its passage. The act, which is remedial, reads as follows:

"That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company, of land forming a part of the right of way of the Northern Pacific Railroad, granted by the Government by any act of Congress, are hereby legalized, validated, and confirmed; Provided, That no such conveyance shall have effect to diminish said right of way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained.

SEC. 2. That this act shall have no validating force until the Northern Pacific Railway Company shall file with the Secretary of the Interior an instrument in writing, accepting its terms and provisions."

This act if standing alone might be susceptible of such construction, but when viewed in the light of its history Congress must have intended to grant a right to the company to make conveyance in the future as well as to confirm those made in the past. In the Townsend case the court said:

"Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. This being the nature of the title to the land granted for the special pur-

pose named, it is evident that to give such efficacy to a statute of limitations of a State as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use, would be to allow that to be done by indirection which could not be done directly, for, as said in Grand Trunk Railroad v. Richardson, 91 U. S., 454, 468, 'a railroad company is not at liberty to alienate any part of its roadway so as to interfere with the full exercise of the franchises granted.' Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by Congress, for, as said in Northern Pacific Railroad Co. v. Smith, 171 U. S. 261, 275, speaking of the very grant under consideration: 'By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance.' Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes. To repeat, the right of way was given in order that the obligations to the United States as-
145 sumed in the acceptance of the act might be performed. Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress as forming the basis of an adverse possession which may ripen into a title good as against the railroad company."

It will thus be seen that the court held that the right of way had been granted for a specific purpose in which the public had an interest; and that because of the interest of the public it could not be invaded or taken away by adverse possession. The act of April 28, 1904, is a waiver of that policy, as plainly as if it had been stated in terms. Else, why the proviso that no such conveyance shall have the effect to diminish the right of way to a width less than 100 feet on each side of the center line of the railroad as now established and maintained? It was at once a recognition of what the company had been doing and a license to reduce by sale or otherwise its right of way to 200 feet. The Congress of the United States could have no possible interest in the individuals who had purchased a part of the right of way. Its only concern was in compelling the retention of so much of the granted right of way as it deemed to be necessary for the purposes of the railroad, and to carry out the spirit and intent of the original granting act. To say that it was the intent of the statute to relieve only certain undisclosed grantees would do violence to the spirit of the act. Furthermore, if the act be construed according to its letter, it would only operate upon deeds and contracts, and by no process of reason-

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ing could it be held to apply to titles by adverse possession. It is only upon the theory that the history of the act as well as the circumstances calling for its passage indicate a change of policy on the part of the United States government and an intent to permit voluntary disposition of the excess of the right of way, that the decision in the Ely case can be sustained. The question is not, however, expressly decided but rather reserved in the Ely case, the court saying:

"The act of April 28, 1904, in view of our decision in that case (the Townsend case) was obviously intended to and did have
146 the effect to narrow the right of way to 200 feet in width, so far at least as outside of that strip of the original right of way had been parted with."

It being a question of governmental policy and that alone, the conclusion is none the less manifest that the obvious intent of the statute was to waive the interest of the public in the strip outside of the original right of way. The act is remedial rather than curative, and falls within the rule that remedial statutes will be given prospective force unless the language employed conclusively negatives that construction. We are unwilling to believe that the employment of the word "heretofore" is sufficient to overcome the spirit of the act as gathered from the mischief sought to be cured, the circumstances calling for its passage, and the policy of the government as announced by the supreme court in the Townsend case. Public policy favors alienation of lands, and we will not presume that Congress found particular reasons to confirm a few conveyances, and at the same time assumed that the company had made all the conveyances it ever would make, or find necessary to make.

Appellant insists upon a strict construction of the act and especially of the word "heretofore," saying that if our version of the law be accepted that word would be entirely eliminated from the statute; that the act does not provide that all conveyances are validated and confirmed, but operates only on an acceptance of its terms by the railway company. However forceful this argument may be, it is without merit in the light of the subject matter of the act, the object sought to be accomplished and the decision of the Supreme Court of the United States in the Ely case. As heretofore suggested, that case cannot be sustained upon any theory other than the one we have adopted. A strict construction of the act would entirely destroy the reasoning employed by the court to sustain its judgment. It is true that words of common usage should be given their ordinary meaning. This rule is not violated by our holding that the act of April 28, 1904, has prospective force.
147 We have said that the Ely case could not have been decided as it was if the act is given a strict construction. The Ely case involved a title acquired by adverse possession. Such a title is not included within the literal words "all conveyances heretofore made." The whole act is drawn either upon the theory that it operates only upon conveyances, i. e. express contracts of the company, or upon the theory of waiver of interest on the part of

the government in the right of way, as asserted in the act and affirmed in the Townsend case, so long as the act or inaction (the Ely case) of the company does not operate "to diminish the right of way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained."

Again, if the act be held to operate only upon prior conveyances, how could the acceptance of "the terms and provisions" of the act benefit one holding under a hostile and adverse possession. In the Townsend case it is said that a title could not be acquired in the right of way by prescription or otherwise, because of the government's interest. In the Ely case the same court having the act now before us to consider, has said that such a title can be sustained, because the act was obviously intended to permit the narrowing of the right of way to two hundred feet. The same arguments were made in the Ely case as are now advanced, that is, that the act was plain and would not bear construction. In the light of that case the question to be answered is not difficult; if the act was retrospective and referred only, as is now contended, to certain conveyances theretofore made, the Ely case could not have been decided as it was, for it will not be contended that an adverse title could be set up to any part of the right of way in which the government had an interest. Such titles do not obtain against the government. Only by treating the outer 100 feet as the property of the company,
in which the government had no interest, can Ely's title be
148 called good. The act of April 28, 1904, made no reference,
either by apt words of fair implication to such titles, yet the court said:

"So far as title to portions of the right of way could be lawfully acquired from the railway company, defendants below, appellees in the Supreme Court, had acquired title to their parcels by adverse possession, and occupied the same position as if they had received conveyance, which the act of April 28, 1904, operated to confirm. The act is remedial and to be construed accordingly."

The case was decided upon the theory that the government had waived its interest. If that theory be unsound, it should be corrected by the Supreme Court of the United States and not by us. That court may say that it has not so decided, or that we have misread its opinion, or that it did so decide and upon further consideration has concluded that it was in error; but an inferior court cannot so discriminate, it must take the law as it is at present written.

The point is made that the act of 1904 operates only on titles by prescription or by adverse possession where the period of limitation had run. The quotation last made is relied on to sustain this contention. There is nothing in the act that says this is so, nor do we think the Supreme Court of the United States has so held.

There seems to be a dearth of authority subject to concrete application to the case at bar. In construing a similar law, the supreme court in McFadden *v.* Evans, Snider, Buel Co., 185 U. S. 505, held the words "heretofore" and "hereby validated" evidenced an intent that the act should be applied to matters occurring before the passage

of the act. The prospective force of the statute was not passed on. The court was considering a statute involving private right. In our judgment there is a distinction between acts applying to private rights or contracts and an act which by its terms waives the interest of the public. Neither do we conceive the act to be special in its terms. It applies to all deeds and contracts as plainly as if it had been said, "The United States waives its interest in the outer 100 feet of the right way of the Northern Pacific Railroad Company, confirms all grants heretofore made, and to be hereafter
149 made, provided that no conveyance shall now or hereafter be held to convey any part of the 100-foot strip on either side of the main line." This view of the statute compels an affirmance of the Concannon case.

Shade and Classen claim under an original settlement by one Wright. Wright settled believing the land subject to homestead and would, under the decision in McNaught v. May, 52 Wash. 652, be held to have failed to initiate a title. His successors have, however, erected valuable improvements. Shade's settlement dates from March, 1895, and Classen's from the year 1897. Their occupancy we find to be adverse and their cases fall within the rule governing the Concannon case, and entitles them to an affirmance of the judgment.

Finally, it is contended that if we hold as we have it will be to find in legal effect that an abandonment or forfeiture has been worked by the act of 1904, and that the land would revert to the government and would not be subject to private ownership, under the authority of the United States in So. Pac. Ry. Co., 146 U. S. 570, and the United States v. Northern Pacific Railway Co. 177 U. S. 435.

We find nothing in the act to warrant us in holding that Congress intended to find that any part of the right of way was abandoned or forfeited. The scope of the act is plain; that is to permit the company to pass title to a part of its right of way, by deed or by the process of elimination. The authorities cited have no bearing on the instant case.

Neither is there merit in the suggestion that if Congress had intended to legislate as we have found that intent to be, it would have made the act apply to all land grant companies. The Congress might have legislated for all but it did not. Its motive is of no concern to the courts.

Judgments affirmed.

CHADWICK.

We concur:
CROW, *C. J.*
PARKER, *J.*
GOSE, *J.*
ELLIS, *J.*
MAIN, *J.*
MORRIS, *J.*

150 In the Supreme Court of the State of Washington.

No. 9771.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
vs.
P. J. CONCANNON et ux., R. SHADE et ux., and MARY CLASSEN, Respondents.

Judgment.

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Pierce county, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 28th day of October, A. D. 1913, on motion of Gordon, Easterday & Askern, of counsel for respondents, considered, adjudged and decreed, that the judgment of the said superior court be, and the same is, hereby affirmed with costs; and that the said P. J. Concannon et ux. and R. Shade et ux., have and recover of and from the said Northern Pacific Railway Company and from the National Surety Company surety, their costs of this action as follows: to-wit: P. J. Concannon et ux., Sixty-six dollars, and R. Shade et ux., Twenty-eight and 75/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings in accordance herewith.

151 In the Supreme Court of the State of Washington, October Term, 1913.

Filed Dec. 24, 1913. Fred S. Guyot, Dep. Clerk.

#9771.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Appellant,
vs.
P. J. CONCANNON and WIFE, Respondents.

Petition for Writ of Error.

Comes now the above named appellant, Northern Pacific Railway Company, and shows to the court that in the above case, this court rendered judgment on the 7th day of October, 1913, against the appellant and in favor of the respondent above named, and the said judgment was, and is, a final judgment.

Appellant was, and is, aggrieved by the said judgment and the proceedings had in this cause in that certain errors were committed to its prejudice specifically pointed out in the assignment of errors presented herewith.

This is an action in which the appellant claims title to certain described lands under and by virtue of certain acts and joint resolutions of Congress, namely; the Act of Congress of July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and Telegraph Line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route"; and a joint resolution of the Forty-first Congress of the United States at its first session entitled, "Joint Resolution granting right of way for the construction of a Railroad from a point at or near Portland, Oregon, to a point west of the Cascade Mountains, in Washington Territory", approved April 10th, 1869; and a joint resolution of the said Forty-first Congress at its second session entitled, "A Resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the
152 construction of its road and to secure the same by mortgage, and for other purposes", approved May 31st, 1870; and in and by the said judgment of this court the right so claimed by appellant under the said act and joint resolution of Congress, was drawn in question, and the judgment of this court was, and is, against the said title and right claimed by appellant under the said act and joint resolutions of Congress, and the same is believed to be contrary to the said act and joint resolutions, all of which will more fully appear in detail from the assignment of errors filed herein.

Appellant further states that this action likewise involves a right claimed under and by virtue of a certain act of Congress dated the 28th day of April, 1904, reading as follows: "That all conveyances heretofore made by the Northern Pacific Railroad Company, or by the Northern Pacific Railway Company, of land formerly a part of the right of way of the Northern Pacific Railroad, granted by the Government by an Act of Congress, are hereby legalized, validated and confirmed. Provided that no such conveyances shall have effect to diminish said right of way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained.

SEC. 2. That this act shall have no validating force until the Northern Pacific Railway Company shall file with the Secretary of the Interior an instrument in writing accepting its terms and provisions."

The decision and judgment of this court was against said right claimed and asserted by appellant under and by virtue of said Act of Congress, and the same is believed to be erroneous and contrary to the said statute, as will more fully appear in detail from the assignment of errors filed herewith.

Appellant states that the said decision was rendered by the highest court of the State of Washington and is final and conclusive so far as the courts of said state are concerned, and will so remain
153 until and unless corrected and reviewed by the Supreme court of the United States in virtue of the writ now prayed for.

Wherefore, the Northern Pacific Railway Company prays that writ of error may issue to the Supreme Court of the State of Washington for the correcting of the errors complained of, and that a

duly authenticated transcript of the record, proceedings and papers herein may be sent to the United States Supreme Court.

GEO. T. REID,
J. W. QUICK,
L. B. DA PONTE,
Attorneys for Appellant.

154 Received Dec. 24, 1913.

In the Supreme Court of the State of Washington, October Term, 1913.

#9771.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
vs.
P. J. CONCANNON and WIFE, Respondents.

Allowance for Writ of Error.

Comes now the Northern Pacific Railway Company on this 24th day of December A. D. 1913, by its attorney, and files and presents to this court its petition praying for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Washington, and praying that a duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered, may be sent to the Supreme court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this court, through its Chief Justice, desiring to give petitioner an opportunity to test in the Supreme court of the United States the questions therein presented, it is

Ordered by the court that a writ of error be allowed as prayed for, provided, however, that the appellant shall give bond according to law in the sum of $2,000.00, which bond shall operate as a supersedeas bond herein.

In testimony whereof, witness my hand this 24 day of December, A. D. 1913.

HERMAN D. CROW,
Chief Justice of the Supreme Court in and for the State of Washington.

Filed Dec. 24, 1913. Fred S. Guyot, Dep. Clerk.

155 Received Dec. 31, 1913.

9771.

Filed Dec. 31, 1913. Fred S. Guyot, Dep. Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Supreme Court of the State of Washington, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had, in a suit between the Northern Pacific Railway Company, a corporation, plaintiff and plaintiff in error, and P. J. Concannon and wife, defendants and defendants in error, wherein was drawn in question the construction of certain statutes of the United States, and the decision was against the right and title specially set up and claimed under such statutes, manifest errors have happened to the great damage of the said Northern Pacific Railway Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty (60) days from he date hereof, in the said Supreme Court, that the
156 record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct those errors, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 24" day of December, A. D. 1913.

[Seal of the United States District Court, Western District of Washington.]

FRANK L. CROSBY,
Clerk of the United States District Court for the Western District of Washington,
By E. C. ELLINGTON, *Deputy.*

Allowed by—
HERMAN D. CROW,
Chief Justice of Supreme Court of Washington.

157 Received Dec. 31, 1913.

9771.

Filed Dec. 31, 1913. Fred S. Guyot, Dep. Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to P. J. Concannon and Wife, and Huffer, Hayden & Hamilton, Their Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C. within 60 days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Washington, wherein the Northern Pacific Railway Company, a corporation, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Herman D. Crow, Chief Justice of the Supreme Court of the State of Washington, this 26th day of December, A. D. 1913.

HERMAN D. CROW,
Chief Justice of the Supreme Court of the State of Washington.

Service of the foregoing citation is hereby accepted this 29th day of December, 1913.

HUFFER, HAYDEN & HAMILTON AND
HUFFER & HAYDEN,
Attorneys for P. J. Concannon and Wife.

158 In the Supreme Court of the United States.

October Term, 1914. (?)

Filed Dec. 24, 1913. Fred S. Guyot, Dep. Clerk.

9771.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Appellant,
vs.
P. J. CONCANNON and WIFE, Respondents.

Assignment of Errors.

Comes now the plaintiff in error, Northern Pacific Railway Company, and shows that in the record and proceedings in said cause, the Supreme Court of the state of Washington erred to the injury of the plaintiff herein, and to the prejudice and against the rights of the plaintiff in error in the following particulars, to-wit:

I.

The Supreme Court erred in holding and deciding that the defendan- in error had, or could acquire, title by adverse possession, under the laws of Washington, to the premises in controversy herein, being parts of the right of way granted by Congress to the Northern Pacific Railroad Company under and by virtue of the Act of Congress of July 2, 1864, and joint resolutions of Congress of April 10, 1869, and May 31st, 1870, more particularly described in the petition for writ of error herein.

II.

The Supreme Court of the State of Washington erred in holding and deciding that the Act of Congress of April 28, 1904, set out in haec verba in plaintiff's in error petition for writ of error, operated to open the outer 100 feet of the said right of way so granted to the Northern Pacific Railway Company to claims and titles by adverse possession under the laws of the State of Washington, notwithstanding that the said title by adverse possession had not ripened
159 and become perfected at or prior to the date of passage of said Act of Congress of April 28, 1904.

III.

The Supreme Court of the State of Washington erred in failing and refusing to hold, as urged by plaintiff in error, that title by adverse possession could not be acquired to any part of said right of way so granted by Congress unless the same was perfected at or prior to the passage of the said Act of Congress of April 28, 1904.

IV.

The Supreme Court of the State of Washington erred in affirming the judgment in the court below and in refusing to reverse the same and render or direct the entry of judgment in favor of plaintiff in error as prayed.

C. W. BUNN,
Attorney for Plaintiff in Error, Northern Pacific Railway Company, St. Paul, Minnesota.

160 In the Supreme Court of the State of Washington.

October Term, 1913.

Filed Dec. 24, 1913. Fred S. Guyot, Dep. Clerk.

9771.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Appellant,
vs.
P. J. CONCANNON and WIFE, Respondents.

Bond.

Know all men by these presents:

That we, Northern Pacific Railway Company, a corporation, as principal, and the National Surety Company, a corporation, as surety, are held and firmly bound unto the above named respondents P. J. Concannon and wife in the sum of Two Thousand ($2000.00) Dollars, to be paid to them and for the payment of which we bind ourselves and our successors and assigns firmly by these presents.

Sealed with our seals and dated the 23 day of December A. D. 1913.

The condition of this obligation is such that, whereas, the said Northern Pacific Railway Company, plaintiff in error, seeks to prosecute its writ of error in the Supreme Court of the United States and to reverse the judgment rendered in the above entitled cause by the Supreme Court of the State of Washington.

Now, therefore, if the above named plaintiff in error shall prosecute its writ of error to effect and answer all costs and damages which may be adjudged, if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

NORTHERN PACIFIC RAILWAY COMPANY,
By L. B. DA PONTE, *Its Attorney.*
NATIONAL SURETY COMPANY,
By H. B. OPIG, *Attorney in Fact.*

Approved:

HERMAN D. CROW,
Chief Justice, Supreme Court of Washington.

161 In the Supreme Court of the State of Washington.

October Term, 1913.

Filed Dec. 31, 1913. Fred S. Guyot, Dep. Clerk.

9771. No. 28619.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Appellant,
vs.
P. J. CONCANNON and WIFE, Respondents.

Præcipe for Transcript.

To the Clerk of the above entitled Court:

Kindly prepare the record in the above case and include therein the following:

Amended complaint.
Answer to amended complaint.
Reply.
Judgment.
Notice of Appeal.
Appeal Bond.
Testimony taken in the lower court.
Also attach exhibits which were sent up with the record.
Also all the original papers relating to the writ of error.

L. B. DA PONTE,
Attorneys for Appellant.

Service of the foregoing præcipe for transcript, receipt of a copy, is admitted this 29th day of December, 1913.

HUFFER, HAYDEN & HAMILTON AND
HUFFER & HAYDEN,
Attorneys for Respondents.

(Here follows map marked page 162.)

163 In the Supreme Court of the State of Washington.

No. 9771.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
vs.
P. J. CONCANNON, et ux., R. SHADE, et ux., and MARY CLASSEN, Respondents.

Certificate of Clerk.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of the record in the above entitled cause as I have been directed by the plaintiff in error to transmit to the Supreme Court of the United States. And I further certify that in pursuance of the writ of error heretofore filed in this cause I now transmit the said transcript together with the original writ of error and the original citation to the said Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Washington this 19th day of February 1914.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

Endorsed on cover: File No. 24,094. Washington Supreme Court. Term No. 389. Northern Pacific Railway Company, plaintiff in error, vs. P. J. Concannon and Wife. Filed March 12th, 1914. File No. 24,094.

Office Supreme Court, U. S.
FILED
NOV 2 1915
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1915.

NUMBER 87.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

P. J. CONCANNON AND WIFE.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES W. BUNN.

Supreme Court of the United States

OCTOBER TERM, 1915.

NUMBER 87.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

P. J. CONCANNON AND WIFE.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is a writ of error to the Supreme Court of the State of Washington to review a final judgment of that court which denied the title of plaintiff in error to a portion of the right of way of the Northern Pacific Railroad Company granted by the Act of Congress of July 2, 1864. Plaintiff in error brought ejectment. The complaint alleged the incorporation of the Northern Pacific Railroad Company and the

grant by act of Congress of a right of way 200 feet in width on each side of the railroad where it should pass through the public domain; that the premises in question were within 200 feet of the constructed line; that in 1896 all the right of way and other property of the Northern Pacific Railroad Company was conveyed to the plaintiff in error, Northern Pacific Railway Company, which is a corporation of the State of Wisconsin. (Transcript, p. 2.) The answer set up among other things title to the premises sued for or some part thereof by adverse occupation for ten years or more, ten years being the time required by the laws of Washington to ripen title by adverse occupation. (Transcript, pp. 4-5.)

The evidence was incorporated in a bill of exceptions (Transcript, p. 83) but need not be considered except as it is stated in the opinion. The facts and the ground of decision sufficiently appear in the opinion of the Supreme Court of Washington (Transcript, pp. 84-90). It appears from this opinion that a portion of the premises for which ejectment was brought by the plaintiff in error lay within 200 feet of the center of the railway but more than 100 feet therefrom. This part of the premises was adjudged to belong to defendants in error because of adverse occupation, and that is the only question now raised. This ruling was grounded on the Act of Congress of April 28, 1904, reading:

> "That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company, of land forming a part of the right of way of the Northern Pacific Railroad, granted by the Government by any act of Congress, are hereby legalized, validated, and confirmed; Provided, That no such conveyance shall have effect to diminish said

> right of way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained.
>
> "Sec. 2. That this act shall have no validating force until the Northern Pacific Railway Company shall file with the Secretary of the Interior an instrument in writing, accepting its terms and provisions."

The possession of defendant in error commenced in 1898 and had not continued ten years when Congress passed this act, but had continued ten years before this action was commenced. There was evidence in the case (as appears from the opinion, Transcript p. 85) that defendant's possession followed some possession by one Girard, who again was preceded by one Smith. It was contended by the railway company in the court below that all three, Smith, Girard and Concannon, had been squatters without that sort of hostile and exclusive possession required by the state law to devest title. The state supreme court (Transcript, pp. 85-6) throwing out the possession of Smith and Girard as unsatisfactory and hardly sufficient to sustain a claim of right or to show color of title placed the case exclusively on the possession of Concannon, saying:

> "His holding was at all times hostile to the true owner. The character of his improvements was such as to challenge appellant's interest, and at all times appellant had notice and knowledge of the occupancy, as well as the character of the possession and improvements."

And again (Transcript, p. 86) saying:

> "But, as we view the law, Concannon has to his own credit a possession of ten years which has been admittedly hostile to the appellant."

This possession, as before stated, commenced in 1898 and had not continued ten years when Congress passed the law of 1904. The court planted its decision on the view, that the act of 1904 validated as title a possession commenced in 1898 and by the state statute completed in 1908. The Court held that the effect of the Act of Congress of April 28, 1904, was to permit acquisition of title by adverse possession partly or all *after* the passage of the Act; while we contend that the Act has no future operation.

There is but one question in the case and that is whether the Act of Congress authorized acquisition of titles in the railroad company's right of way by future adverse occupation.

ASSIGNMENT OF ERRORS.

Errors are properly assigned in the record (Transcript, p. 95).

ARGUMENT.

Northern Pacific Railway Company v. Townsend, 190 U. S. 267, determines that the Northern Pacific right of way was a fee granted on condition that it be used for the purposes of the grant; that the railway company is incapable of conveying it or any part of it and that no adverse occupation under state laws can confer title. After this decision it became known to Congress that the railroad company had made deeds purporting to convey certain parcels of its right of way. These deeds and the purchases thereunder having been made in good faith Congress evidently passed the Act of April 28, 1904, to relieve the hardship which would result in such cases by applica-

tion of the rule of the *Townsend* decision. The act says that all conveyances *heretofore* made are confirmed and we submit there is no ground whatsoever for overruling the plain language of the act—which is confined to conveyances *heretofore* made—and by judicial legislation enlarging the act to include conveyances *hereafter* made.

The court in *Northern Pacific Railway Company v. Ely*, 197 U. S. 1, considered a case of adverse occupation which had continued ten years or more before the act of 1904 was passed. On the principle that adverse possession may be considered as tantamount to a conveyance or as presuming a conveyance the Court held that the act, while speaking only of conveyances, should be construed to include adverse occupations. The court said that the defendants in the case "had acquired title to their parcels by adverse possession, and occupied the same position as if they had received conveyances, which the act of April 28, 1904, operated to confirm". Obviously this is an accurate statement of the effect of the act and was carefully and advisedly made by the court. It is an act to confirm certain then existing invalid titles. *McFaddin v. Evans-Snider-Buel Co.*, 185 U. S. 505, 509.

It will not do to say that the act is remedial and therefore should be enlarged to cover matters not included within its language. Undoubtedly it is remedial, but this is no reason why the Court should legislate. The act says "are hereby *legalized, validated* and *confirmed*". Each of the words "legalized," "validated" and "confirmed" is applicable only to things then done and cannot be stretched or tortured to lay down any rule for things afterward to be done. The act says "conveyances heretofore made" are legalized, validated and confirmed. Adverse occupations are not mentioned. The *Ely* decision rests on the inference

that Congress must have intended to include adverse occupations, though mentioning only conveyances. But there is no warrant in that decision for extending the act beyond what was plainly intended by Congress to be its sole operation, viz., an act validating and confirming certain then consummate but imperfect titles. As it is plain that the act is confined in its operation to those *deeds* "heretofore made" and as *adverse possession,* though not mentioned, was held included because tantamount to a deed, there is no ground whatsoever for extending the act beyond validation of adverse possession then consummated. The same language that limits the act to *deeds* "heretofore made" limits similarly the adverse possession to be validated and confirmed, because the only reference to adverse possession is in the words "deeds heretofore made".

Attention is called to the stipulation filed in *Northern Pacific Railway Company v. Shade* and *Northern Pacific Railway Company v. Classen,* numbers 88 and 89 on present docket, that those cases abide the event of this.

CHARLES W. BUNN,
For Plaintiff in Error.

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Supreme Court of the United States

OCTOBER TERM, 1915.

No. 87.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

P. J. CONCANNON AND WIFE.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

CHARLES W. BUNN.

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 87.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

P. J. CONCANNON AND WIFE.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

Our understanding of the decision of the state supreme court (Tr. 85, 86), as stated on page 3 of our brief, is that the court rested its decision wholly on the Federal question; that while discussing the previous possession of Smith and Girard and pointing out the unsatisfactory evidence, particularly of Smith's possession, and the unsatisfactory evidence of conveyance from Smith to Girard and from Girard to Concannon, and without deciding whether the possession of Smith or that of Girard was hostile or whether either possession or both could be tacked to that of Concannon to make continuous hostile possession, the court was entirely satisfied that the possession of *Concannon* was

hostile and did not plant its decision on any other possession.

The brief of defendant in error (pp. 5, 6) questions our conclusion and suggests that the state supreme court intended to plant its decision on two grounds (a) the possession of Concannon, which necessarily involved decision of the Federal question and (b) ten years possession of Concannon and Girard or Concannon, Girard and Smith, tacked together, which if tacked would make ten years possession before the act of 1904 and therefore would not involve the Federal question.

We are confident careful reading of the state court's decision shows the decision to have been planted entirely on Concannon's possession that being the sole ground of decision. But whether or not this be so, it must be admitted that the state court did not *clearly* or *certainly* rest its decision on the non-Federal contention; and that, to say the least, it is doubtful if the court intended to hold that Concannon's possession could be tacked to that of Girard or Girard and Smith.

The state court having clearly and certainly decided the Federal question (as we contend, erroneously) the judgment will be reversed unless it appears clearly and certainly that the state court has actually decided some issue of state law sufficiently broad to maintain the judgment.

And it should be borne in mind that this court will consider the Federal question only and on this writ of error cannot go into the question of state law.

As the court said through Mr. Justice Miller in *Murdock v. Memphis*, 20 Wall 590, p. 636:

> "6. If it was erroneously decided against plaintiff in error, then this court must further inquire whether there is any other matter or issue *ad-*

> *judged* by the State court which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue."

The court said in *Anderson v. Carkins,* 135 U. S. 483, 491:

> "So it results that the federal question in this case was not rightly decided by the state court; and no other question appears which, *rightly decided,* upholds its decree. The case, therefore, must be reversed," etc.

Again the doctrine is stated by Mr. Justice Van Devanter in the opinion in *New Orleans v. National Rice Company,* 234 U. S. 80, 86:

> "As it *clearly* appears that the judgment rested upon a ground which was not only adequate to sustain it but in entire harmony with the carrier's asserted Federal right, it cannot be said that there was a denial of that right," etc.

German Savings Society v. Dormitzer, 192 U. S. 125, 127, is precisely in point. There the court by Mr. Justice Holmes said:

> "But the opinion of the court deals expressly with the constitutional rights of the Savings Society and the Society seems to have insisted on those rights as soon as the divorce was attacked. *Tullock v. Mulvane,* 184 U. S. 497, 503, 504. As to the other point, it is at least doubtful whether the court meant to find any estoppel except on the footing that the property was shown to be community property."

It is to be observed that the important issue in this case is the Federal question and that the decision of that question controls a number of other cases; while if the judgment in this case be reversed for error in deciding the Federal question, the usual order being for further proceedings in acordance with the opinion of this court (*Steinfeld v. Zeckendorf*, opinion Nov. 1, 1915), the state court will be open to hear and decide all the non-Federal questions in the record.

CHARLES W. BUNN,
For Plaintiff in Error.

ADDENDA.

Maguire v. Tyler, 8 Wall. 650, 668-672, is a case where the court below had dismissed the bill without indicating the grounds of the decree. The case involved a federal question and also questions of state law. In the opinion originally filed the court seems to have considered some questions of state law in addition to the federal question and made an order reversing the decree below with directions to affirm the decree of the St. Louis Court of Common Pleas. But on motion to reform the entry of judgment it was pointed out that the judgment as originally entered had the effect to foreclose the state court from consideration of the questions involved of purely state law; and that in a case where the decree of the state court is silent as to the grounds of dismissing the suit, reversal by the Supreme Court should be limited to the federal question alone, leaving still open in the state court the other defenses presented in the record which are of local jurisdiction. The Supreme Court therefore modified its decree and entered directions for remanding the case for further proceedings in conformity to the opinion of the court.

Klinger v. Missouri, 13 Wall. 257, is a case where the ground of decision in the court below did not distinctly appear. The court may have rejected the juror, either for refusal to take the test oath, or because he was an unfit juror. Therefore it was not made to appear that the state court decided a federal question.

Johnson v. Risk, 137 U. S. 300, is a similar case, where it was not made to appear that the state court decided any federal question.

Walter A. Wood Co. v. Skinner, 139 U. S. 293, is a case also where the ground of decision below did not appear in the record and therefore it could not be determined that the state court had decided any federal question.

Eustis v. Bolles, 150 U. S. 361, is a case where it affirmatively appeared that the Supreme Judicial Court of Massachusetts had decided a question of state law sufficient to maintain the judgment.

Dibble v. Bellingham Bay Land Company, 163 U. S. 63, is another case where the state court had considered the federal question but had passed on a question of purely state law sufficient to maintain the judgment no matter how the federal question was decided.

It might be inferred from some language of Mr. Justice Curtis, pp. 38, 39, "Jurisdiction of United States Courts," that he supposed this court might in certain cases pass on questions of purely state law. But it is to be observed, first, that Mr. Justice Curtis is there referring to cases where it does not appear in the record affirmatively that the state court decided a federal question; and, second, that the language referred to of Mr. Justice Curtis is from lectures at the Harvard Law School delivered before the opinion in *Murdock v. Memphis*. The editor of Mr. Justice Curtis' lectures (2nd Ed., pp. 46-52), after stating clearly the opinion in *Murdock v. Memphis*, lays down the present rule as we contend; that is, where the federal question was decided erroneously against plaintiff in error further inquiry in this court is whether any other matter or issue sufficiently broad to maintain the judgment was *adjudged* by the state court.

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Supreme Court of the United States

OCTOBER TERM, 1915

Number 87

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
P. J. CONCANNON AND WIFE,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

WILLIAM E. HAYDEN
For Defendants in Error.

Supreme Court of the United States

OCTOBER TERM, 1915

NUMBER 87.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

P. J. CONCANNON AND WIFE,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

It is stated on page 2 of the brief of plaintiff in error that the answer of defendants in error "set up among other things title to the premises sued for, or some part thereof, by adverse possession for ten years or more." The defendants in error, in addition to alleging, in the first and second affirmative defenses of their answer, title in them perfected by adverse possession for the statutory period of ten years both prior to the commencement of the suit and prior to April 28, 1904, set up also, in their third affirmative defense, title by estoppal by reason of valuable improvements made during the period of such adverse possession in good faith

and in the belief that they were the owners of said land and with the knowledge of plaintiff and the Northern Pacific Railroad Company, and without any objection or claim of title on the part of either of them (Tr., pp. 4 and 5).

The purpose in alleging a perfected title in defendants prior to April 28, 1904, as well as prior to the commencement of the suit, was to meet plaintiff's contention that the act of Congress of that date, entitled, "An Act Validating Certain Conveyances of the Northern Pacific Railroad Company and the Northern Pacific Railway Company" (33 U. S. Stat. at L., p. 538), and the construction of said act by this Court in the case of *Northern Pacific Railway Company vs. Ely*, 197 U. S. 1, 49 Law Ed. 639, made it necessary for defendants to show a perfected title prior to that date.

Defendants contended before the State Supreme Court, and still contend that they had clearly proved a perfected title prior to April 28, 1904, not only by adverse possession, but also by estoppel, and that, in the decision of the case, it was unnecessary to invoke any federal question other than that decided in the *Ely* case, *supra*, adversely to the claims of plaintiff in error.

It is true, as stated on page 3 of the brief of plaintiff in error, that defendants' possession followed possession by one Girard, who, again, was preceded by one Smith, but we submit that it is not altogether true, as stated by counsel on the

same page of his brief, that "the State Supreme Court (Tr., pp. 85-86), throwing out the possession of Smith and Girard as unsatisfactory and hardly sufficient to sustain a claim of right or show color of title, placed the case exclusively on the possession of Concannon." The Court, in its opinion (Tr., p. 85), says:

"His (Concannon's) possession comes through one Smith, who settled on the premises in 1885. Smith sold to one Girard in 1892. So far as the record shows, Smith may have been a squatter. His position is unexplained. Girard fenced the land and made some improvements thereon. Girard remained in exclusive possession of the premises until 1898, when he sold to Concannon, who has added to the improvements so that they now possess the character of a permanent home and are of the value of from $1,500 to $2,000. * * * Girard testifies he received a deed from Smith and that he gave this deed and his own to Concannon. Concannon swears that he received a deed. None of these instruments were recorded and, according to the testimony of Concannon, they are now lost. Although neither of these witnesses can remember who made out the deeds, they agree in a general way as to the description of them and both say that the recited description of the land was such as to include the disputed tract. Both insist that it was their intention to claim the land as against the world." * * "It is insisted, however, that the possession of Concannon, which dates from 1898, cannot be tacked to that of Girard, and, without it, his title cannot be sustained. The rule, as we understand it to be, is that where there is a privity of interest, *such possession can be tacked.* We grant that the evidence of the deeds from Smith to Girard and from Girard to Concannon is unsatisfactory, and, *without the aid of the other circumstances and conditions which we have noticed,*

would hardly be sufficient to sustain a claim of right or show color of title. But, as we view the law, Concannon has to his own credit a possession of ten years which has been admittedly hostile to the appellant."

In the next to the last sentence of the above quotation, the intimation, if not the holding, is that the evidence of these deeds, though unsatisfactory, is, *with* the aid of the other circumstances and conditions noticed, sufficient to sustain a claim of right and show color of title.

The State Supreme Court did not pass upon, or even refer to the defense of estoppel set up in defendants' third affirmative defense, notwithstanding the fact that this and other courts have held that title by estoppel can be acquired short of the limitation period. *(Galliher vs. Cadwell,* 145 U. S. 368; 36 Law Ed., p. 740, and cases therein cited; *Patterson vs. Hewitt,* 195 U. S. 309; 49 Law Ed. 214; *2 Pomeroy's Equity Jurisprudence,* Sec. 818, p. 1451).

While the State Court holds that the Validating Act authorizes title by adverse possession initiated before the passage of that act and completed thereafter, we submit that the facts found by the Court in its opinion (Tr., pp. 85 and 86) are sufficient to show a perfected title in defendants on April 28, 1904.

ARGUMENT.

I.

The only obstacle that ever existed in the way of obtaining title to any part of the right of way in question, either by conveyance from the Company or by adverse possession, was the policy of the government to keep the right of way undiminished and unimpaired to the end that the Company might perform its duty to the public as a common carrier, and it was specifically upon this ground that this Court, in the case of *Northern Pacific Railway Co. vs. Townsend*, 190 U. S. 267; 47 Law Ed. 1044, decided against the claims of titles by adverse possession set up in that case.

The act of April 28, 1904, was a solemn declaration of the public policy of the United States with respect to the right of way in question, assented to by the Northern Pacific Railway Co., that 100 feet on each side of the center line of the main track of its railroad as now established and maintained was sufficient to enable the Company to perform all of the obligations to the United States and to the public generally which it assumed when it accepted the right of way and established its railroad. The effect of the passage of the act was to eliminate the interest of the United States in that portion of the right of way outside of the 100-foot limit and, the interest of the government being eliminated, the parties to this case stand with respect to the land in controversy in the position of mere private pro-

prietors, and their respective rights are to be determined according to rules no different from those employed in determining the rights of other parties to other lands.

In the case of *Northern Pacific Railway Co. vs. Ely*, 197 U. S. 1; 49 Law Ed. 641, this Court, after referring to its holding in the *Townsend* case that individuals could not, for private purposes, acquire by adverse possession any portion of a right of way granted by the United States to a railroad company in the manner and under the conditions that the right of way was granted to the Northern Pacific Railroad Company, says

"We are not prepared to overrule that decision, and, tested by it, the judgment in this case must be reversed. But we were then dealing with the *original right of way* which was of a width of 400 feet."

Again:

"The act of April 28, 1904, in view of our decision of that case, was obviously intended to and did have the effect to *narrow the right of way to 200 feet* in width so far, at least, as, outside of that strip, the original right of way had been parted with."

We contend that the Validating Act is addressed to the future as well as to the past—that it was intended to operate upon, and give a certain legal effect to not only what had been done, but also what might be done in the future.

In its retrospective operation, it gave to adverse possession of that part of the right of way of the Company lying outside of the 100-foot limit a qual-

ity and legal effect which it did not before have, and provided, in substance, that such possession, theretofore a legal nullity, should become an effective means of divesting the Company's title and vesting such title in the adverse claimant. This being the quality given such possession when of ten years' duration, it is difficult to understand why such possession, though for only six years, should not, *pro tanto*, have the same quality.

Referring to the period of defendants' adverse possession intervening between the date of the Validating Act and the time of the commencement of the suit, it is to be noted that all legislation is, presumptively, addressed to the future and this presumption is strengthened in view of the purpose of the act to waive any interest the United States might have to that portion of the right of way lying outside of the 100-foot limit, and, we submit, it is not overborne merely by the use in the act of the word "*heretofore.*"

II.

The Validating Act may also be considered as an amendment to the act of Congress and the joint resolutions mentioned in plaintiff complaint as the sources of its title to the right of way in question.

For the title to its right of way, plaintiff relies upon the act of Congress of July 2, 1864, entitled, "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound on the Pacific Coast by the

Northern Route" (13 U. S. Stat. at L., p. 365), "Joint Resolution Granting Right of Way for the Construction of a Railroad from a Point at or near Portland, Oregon, to a Point West of the Cascade Mountains, in Washington Territory," approved April 10, 1869 (16 U. S. Stat. at L., p. 57), and "A Resolution Authorizing the Northern Pacific Railroad Company to Issue Its Bonds for the Construction of Its Road and to Secure the Same by a Mortgage and for Other Purposes," approved May 31, 1870 (16 U. S. Stat. at L., p. 378).

Section 1 of the act of July 2, 1864, empowers the Northern Pacific Railroad Company "to lay out, locate * * * a continuous railroad * * * beginning at a point on Lake Superior in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route * * * to some point on Puget's Sound, with a branch, *via* the valley of the Columbia River, to a point at or near Portland, in the State of Oregon," and section 2 grants to said Company, its successors and assigns, a right of way for the construction of the road "to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain." Section 20 of said act provides:

"That the better to accomplish the object of this act, namely, to *promote the public interest and welfare* by the construction of said railroad and telegraph line, and keeping the same in working order,

and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, *add to, alter, amend, or repeal this act.*"

The joint resolution of April 10, 1869, authorizes the Railroad Company "to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound * * said extension being subject to all the conditions, and provisions, and said Company in respect thereto being entitled to all the rights and privileges conferred by the act incorporating said Company, and all acts additional to and amendatory thereof."

Section 1 of the resolution of May 31, 1870, after authorizing the execution of a bond mortgage, also authorizes the Company "to locate and construct, under the provisions and with the privileges, grants and duties provided for in its act of incorporation, its main road to some point on Puget Sound, *via* the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound."

Section 2 of said joint resolution provides: "That Congress *may at any time alter or amend this joint resolution*, having due regard to the rights of the said Company, and any other parties."

If, as is implied by the conveyances which have been made by the Northern Pacific Railway Com-

pany and its predecessor in interest and the passage by Congress of the Validating Act, 100 feet on each side of the center line of its road is sufficient to enable it to perform its duties and discharge its obligations to the United States and to the public generally, the "public interest and welfare" demanded that all the obstacles that lay in the way of the alienation by the Northern Pacific Railway Company of that part of its right of way not needed in the operation of its road should be removed, and we submit that in and by said act all of such obstacles were removed, and that the act of July 2, 1864, and said joint resolutions were amended accordingly.

Respectfully submitted,

WILLIAM H. HAYDEN,

For Defendants in Error.

NORTHERN PACIFIC RAILWAY COMPANY *v.* CONCANNON.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 87. Argued December 3, 1915.—Decided December 20, 1915.

The Act of April 28, 1904, c. 1782, 33 Stat. 538, validating conveyances of land within the lines of the right of way of the Northern Pacific Railway related only to conveyances theretofore made, and did not confer on the Railway Company power in the future to dispose of the right of way nor on others the power to obtain possession of any part thereof by adverse possession. *Northern Pacific Rwy.* v. *Ely*, 197 U. S. 1, distinguished.

While title by adverse possession might have been obtained to portions of the right of way of the Northern Pacific Railway under the Act of April 28, 1904, if the adverse possession had ripened into title prior to the passage of the act, title cannot be obtained thereunder if any part of the period of adverse possession is subsequent thereto.

While a remedial statute should be construed so as to embrace remedies which it was intended to afford, its words should not be so extended as to destroy express limitations and cause it to accomplish purposes which its text shows it was not intended to reach.

In this case the judgment of the state court cannot be sustained as resting on a ground independent of the construction of the Federal statute involved.

While an issue remaining open on the remanding of the case may be one arising under state law which should primarily be disposed of by the state court, this court has the ultimate authority to review the decision on such question to the extent essential to the enforcement of Federal rights involved.

75 Washington 591, reversed.

THE facts, which involve the construction of acts of Congress relating to the right of way of the Northern Pacific Railway, are stated in the opinion.

Mr. Charles W. Bunn for plaintiff in error.

Mr. William H. Hayden for defendants in error submitted.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

As the successor to the rights of the Northern Pacific Railroad Company the Railway Company, plaintiff in error, sued to recover a piece of land alleged to be within the strip 400 feet wide granted by the act of Congress of July 2, 1864, to the former company as a right of way. (13 Stat. 365, c. 217.) The asserted right to a reversal of the decree which awarded the land to the defendant is based upon an error which it is asserted the court committed in interpreting an act of Congress. (April 28, 1904, 33 Stat. 538, c. 1782.)

To at once recur to a previous ruling concerning the power of the company to dispose of land embraced in the grant of right of way which undoubtedly led to the adoption of the act of Congress referred to, and additionally to refer to a decision concerning the significance of that act rendered before this case arose, will make clear the question to be decided.

In *Northern Pacific Ry.* v. *Townsend*, 190 U. S. 267, it became necessary to determine whether title by adverse possession under a state law, could be acquired to any portion of the Railroad's right of way. Applying the principles announced in *Northern Pacific Ry.* v. *Smith*, 171 U. S. 261, it was held that as the Railroad Company to which the right of way was originally granted was in-

capable of conveying any part of the 400 feet strip composing its right of way, it followed that no possession adverse to the company could confer title, any state law to the contrary notwithstanding. About a year after this decision the act to which we have previously referred was adopted, the title and first section reading as follows, 33 Stat. 538:

"An Act Validating certain conveyances of the Northern Pacific Railroad Company and the Northern Pacific Railway Company.

"That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company, of land forming a part of the right of way of the Northern Pacific Railroad, granted by the Government by any Act of Congress, are hereby legalized, validated, and confirmed: *Provided*, That no such conveyance shall have effect to diminish said right of way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained."

The second and last section made the act operative only upon acceptance of its terms by the Northern Pacific Railway Company.

There was presented in *Northern Pacific Ry.* v. *Ely*, 197 U. S. 1, the question whether this statute gave validity to a title by adverse possession to a piece of land outside of the 200, but within the 400 feet of the right of way where the possession relied upon was completed before the act was adopted and therefore was adequate at that time under the state law to bar the title of the company. Although the statute only expressly embraced "conveyances heretofore made," it was decided that in view of its remedial purposes its provisions were applicable to the case in hand; that is, it was held that the word conveyance included also a sufficient adverse possession completed when the act was passed.

As the land in controversy in this case is within the 400 but outside the 200 feet, the court below was right in concluding that it was within the provisions of the act if they were otherwise applicable. In determining such applicability as it was found that at the time the act was passed the possession of the defendant had not existed for a sufficient length of time to bar the right of the railroad, the court came to consider whether the statute authorized the taking into view of adverse possession enjoyed after the passage of the act. Answering this inquiry from a consideration not only of the text of the act, but of the ruling in *Northern Pacific Ry.* v. *Ely*, *supra*, it was decided that the statute intended to permit the consideration of such subsequent possession and therefore the title by possession of the defendant which was inadequate considering the state of things existing at the time of the passage of the statute, was decided to be valid as against the Railway Company, in consequence of the effect given to the possession after the passage of the statute. 75 Washington, 591.

We are of opinion that this interpretation of the act is inconsistent with its text and was erroneously supposed to be supported by the ruling in *Northern Pacific Ry.* v. *Ely*. We say it is inconsistent with its text, because in express terms the validating power which the act exerted was made applicable only to "all conveyances heretofore made" and nothing in the context lends itself to the conclusion that Congress contemplated conferring on the Railway Company unlimited power in the future to dispose of its right of way or to give the right to others to divest the railroad of the title to such right of way by future adverse possession. And this meaning of the act is aptly illustrated by its title since it treats its provisions as only confirming conveyances theretofore made and not as conferring power on the Railway Company to make conveyances of its right of way for the future.

But the argument is that although this interpretation may as an original question be well founded, it is not open to adopt it consistently with the ruling in the *Ely Case*. The reasoning is this: The statute, it is said, if literally interpreted, only relates to conveyances and not to adverse possession, but as adverse possession complete at the time of the passage of the act was brought within its scope by the ruling in the *Ely Case*, therefore the statute was in that case interpreted in a broad and not a literal sense. Giving to the statute this significance, the argument is that it is inconsistent to now hold that the statute does not include all conveyances and all possession without regard to whether they were made or perfected before or after the passage of the act. But this fails to consider that the ruling in the *Ely Case* related exclusively to a possession which had completely ripened at the time of the passage of the act, and therefore that case was concerned only with the subject with which the statute dealt, that is, rights hitherto acquired, and which were in a generic sense within the remedy which the statute was intended to afford—the curing of infirmities in title which had become complete prior to the passage of the act. Indeed the opinion in the *Ely Case* shows that the reasoning by which it came to pass that the word conveyances in the statute also embraced title by possession perfected before the passage of the act was but an application of the familiar rule that a remedial statute, where it is reasonably possible to do so, must be interpreted so as to embrace the remedies which it was obviously intended to afford. The difference then between that case and this is that which exists between on the one hand interpreting the words of the statute so as to cause them to include things which are within its contemplation and on the other hand adopting of an interpretation which would destroy the express limitations of the statute and cause it to accomplish a purpose which its text plainly demonstrates it was not intended to reach.

It is urged that even if it be found that error was committed in interpreting the statute, nevertheless the judgment below should be affirmed because it rests not alone upon the mistaken interpretation of the statute, but also upon an independent state ground adequate to sustain it, that is, a finding that there had been possession adequate to bar the right of the Railway Company completed before the adoption of the act. We are of opinion, however, that there is no ground upon which this proposition can rest since the court below after finding that the defendant's possession before the act had not been for a sufficient time to bar the right of the Railway Company, and then considering whether an adequate lapse of time would not result from joining to the possession of the defendant the prior possession of other persons asserted to be predecessors in title of the defendant, did not pass upon that question. On the contrary the court after pointing out difficulties arising from what it considered to be infirmities in the proof concerning the nature and character of the possession of the alleged predecessors and their privity with the defendant, held that it was unnecessary to solve such difficulties because under the statute the defendant could complete the time necessary to bar the right of the Railway Company by resorting to possession enjoyed by him after the passage of the act.

Although from these considerations it results that our duty is to reverse because of the erroneous construction given to the act of Congress and which was the sole basis of the decision below, we are of opinion that the order of reversal should not preclude the right in the court below to consider and pass upon, in the light of the statute as correctly construed, the question of adverse possession asserted to have been completed prior to the passage of the act which as we have seen the court did not dispose of because of the erroneous opinion which it entertained concerning the meaning of the act of Congress and our decree

therefore will leave that question open. The issue thus left open involves a question arising under the state law which should be passed upon primarily by the state court. In saying this however we must not be considered as holding that ultimate authority to review such question when passed upon would not exist in this court to the extent that such power to review may be essential to the enforcement of the provisions of the act of Congress in question. *Kansas City Southern Ry.* v. *Albers Commission Co.*, 223 U. S. 573, 591; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 251; *Norfolk & Western Ry.* v. *West Virginia*, 236 U. S. 605, 609–610. See *Gaar, Scott & Co.* v. *Shannon*, 223 U. S. 468, 470–471. It follows subject to the reservation stated that the judgment below must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.